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FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 73-435

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of AMERICAN BROADCASTING COS., INC. (ABC) For Renewal of Authority To Deliver Network Television Programs to Station XETV, Tijuana, Mexico	Docket No. 18606 File No. BFP-381

MEMORANDUM OPINION AND ORDER

(Adopted April 25, 1973; Released May 2, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONERS REID AND WILEY ABSENT.

1. This proceeding involves the application of American Broadcasting Companies, Inc. (ABC) for renewal of its authority under Section 325(b) of the Communications Act to deliver its network television programming to station XETV located at Tijuana, Baja California, Mexico, for broadcast back to the San Diego, California, market. By a Decision, 35 FCC 2d 1, released May 30, 1972, the application was denied and ABC was directed to terminate its affiliation with the Mexican station. However, in order to afford ABC an opportunity to come into compliance and to enable the parties to obtain judicial review of the Decision if desired, the Commission authorized ABC to continue the delivery of network programming to XETV until July 31, 1972, or in the event that judicial review is sought, "until 30 days after the final disposition of such appeal." Judicial review proceedings were instituted and, on December 27, 1972, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's Decision.

2. Thereafter, a Memorandum of Understanding was executed on February 21, 1973 by Western Telecasters, Inc., licensee of UHF station KCST-TV at San Diego, California; Radio-Television, S. A., licensee of XETV; Bay City Television, Inc., the United States sales agent for XETV; and ABC. Pursuant to that Memorandum which indicated that no further judicial review proceedings would be undertaken, the parties thereto filed with the Commission on February 22, 1973, a joint request for modification of the Commission's Decision to authorize the continued transmission of daytime network programs to XETV until June 1, 1973 and all other network programs until July 1, 1973. The requested authority was granted. FCC 73-227, released March 6, 1973.

3. Now before the Commission for consideration is a petition filed on March 19, 1973 by Radio-Television, S. A. and Bay City requesting that this matter be redesignated for hearing on a number of suggested

issues, that the effectiveness of the Commission's Decision as modified by the Memorandum Opinion and Order released March 6, 1973, be suspended indefinitely, and that in the interim ABC be authorized to continue to supply its programming to XETV. The petition was prompted by a March 14, 1973 newspaper article which announced that Bass Brothers Enterprises, Inc., of which Western Telecasters is a wholly owned subsidiary, had agreed to sell all of Western Telecasters' stock to Storer Broadcasting Company for $12,000,000.00. XETV asserts that the alleged superiority of KCST's local program service over that of XETV was the principal ground for the decisions of the Commission and the United States Court of Appeals, and the proposed sale therefore vitiates the basis of those decisions; that apparently Bass Brothers was never interested in serving the people of San Diego "but only in making a speculative windfall"; and that, in addition to other issues, the proceeding should be designated for further hearing to determine whether Bass Brothers have been guilty of deception, deceit or misrepresentation and are, therefore, disqualified from consideration as the ABC affiliate in San Diego or from continuing as Commission licensees. XETV further states that its participation in the Memorandum of Understanding was procured by fraud and it is no longer bound thereby, and that it proposes to resume the pursuit of its judicial remedies by filing a petition for a writ of certiorari with the Supreme Court of the United States.[1]

4. XETV advances no adequate basis for disturbing our Decision or the March 6, 1973 modification thereof, and its petition must be denied. First we note that ABC, which is the applicant in this proceeding, has not joined with XETV in either the petition now under consideration or the petition for certiorari filed with the Supreme Court,[2] and the network has given no indication that it will not comply with the terms of the Memorandum of Understanding. In that Memorandum, ABC agreed to discontinue the transmission of network programs to the Mexican station by certain specified dates and to "enter into a primary affiliation on an interconnected basis with KCST subject only to good faith negotiation of an affiliation contract which should be undertaken forthwith." In effect, therefore, XETV is requesting not merely that we authorize the continued transmission to it of ABC network programming but that we direct ABC to continue the transmission of such programming. Without undertaking to pass on the question of whether we possess the authority to issue such an order, a far more substantial showing would be required to justify the requested action than has been made here.

5. Major considerations in our determination that the public interest would not be served by renewing ABC's Section 325(b) authority to provide XETV with network programming for broadcast back to the San Diego market were our findings predicated upon an extensive evidentiary record, that XETV's programming was deficient in that it failed in numerous respects to render a local service which met the

[1] On March 29, 1973, Storer Broadcasting filed an opposition to the petition and Western Telecasters filed a motion for summary dismissal of the petition. Radio-Television, S. A. and Bay City Television filed a pleading responsive to both Storer's opposition and Western Telecasters' motion on April 5, 1973 and an *erratum* on April 6, 1973.

[2] It appears that XETV did file such a petition on March 26, 1973.

needs and interests of San Diego, that a third television station with the facilities and equipment to be a network affiliate is now available in the San Diego area, and that the Commission's policy of fostering UHF television development would be furthered by denying the ABC renewal request. In its pleadings, XETV makes no significant challenge to these basic considerations but instead directs its attack against the advisability of authorizing a transfer of control of the licensee of KCST to Storer Broadcasting. Thus XETV contends that the proposed sale constitutes an abandonment of the local programming commitment made by the licensee of KCST to the Commission at the hearing on ABC's application and that there is no assurance that the proposed transferee will honor this commitment. Not only is XETV's charge based solely on conjecture and surmise, but it is not a matter for consideration in this proceeding. Whether Storer Broadcasting will provide local programming to meet the needs and interests of the San Diego area, as well as all other relevant public interest considerations, will be determined in connection with the disposition of any transfer application which may be filed. It is not a matter for determination in this proceeding which relates to the application of ABC for renewal of its Section 325(b) authorization.

6. Likewise, we do not believe that this is the proper proceeding in which to pass upon XETV's charges that the licensee of KCST has been guilty of trafficking, fraud and deception. Even assuming, without in any way deciding, that there is some merit to these charges, the appropriate place for their consideration and resolution is in a renewal or revocation proceeding where the licensee is a party respondent—not here where the applicant is ABC.

7. After a full evidentiary hearing, the Commission concluded that the public interest would be served by the termination of ABC's Section 325(b) authority to provide XETV with network programming for broadcast back to the San Diego market and we find no reason to depart from the views therein expressed. On the basis of the representations contained in the pleading submitted to the Commission by ABC, XETV, and Western Telecasters, together with the Memorandum of Understanding attached thereto, we granted in our March 6, 1973 Order an extension of ABC's Section 325(b) authorization. We have now given careful consideration to the further pleadings filed in this case, but we remain persuaded that no further hearing on the ABC application is warranted and that the public interest requires the implementation of our Decision without further delay.

8. Accordingly, IT IS ORDERED, That the petition filed on March 19, 1973 by Radio-Television, S.A. and Bay City Television, Inc. IS DENIED; and that the motion filed on March 29, 1973, by Western Telecasters, Inc. IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-427

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Application of AMERICAN SATELLITE CORP. For Section 214 Authorization to Lease From Telesat Canada Transponder Channels on Telesat's ANIK Satellites	File Nos. P-C-8554 65-DSE-P-71 67-DSE-P-71 68-DSE°P-71 70-DSE-P-71

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1973; Released April 19, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT.

1. On February 8, 1973, American Satellite Corporation filed an application for authority, pursuant to Section 214 of the Communications Act to lease from Telesat Canada transponder channels for temporary use with the above-captioned proposed earth stations. In response to the Public Notice of March 8, 1973 with respect to American Satellite's proposal, the Commission has received a "Petition to Dismiss or Designate for Evidentiary Hearing" from Western Union Telegraph Company (Western Union); and comments from CML Satellite Corporation (CML); Telesat Canada (Telesat); TelePrompTer Corporation (TelePrompTer); General Electric Company (GE); and RCA Global Communications, Inc. and RCA Alaska Communications, Inc. (RCA).

2. Upon consideration of the filings we think it appropriate to make a threshold determination of policy at this time with respect to temporary use of the space segment of the Telesat system by qualified applicants in order to assist the planning of the affected applicants and other interested entities. Western Union's request, dated April 3, 1973, that we first determine whether the affected applicants are qualified is rejected. We do not here undertake to make any finding as to the basic qualifications of American Satellite or any other interested applicant or as to whether their proposals are otherwise in the public interest and in compliance with our policy objectives set forth in the various orders in Docket No. 16495. Questions of this nature will be resolved when the applications have been fully processed and we are considering whether specific grants should be made. The issue before us now is one of general applicability and, in our judgment, warrants a prompt formulation of policy for the guidance of those concerned. See Section 4(j) of the Communications Act.

I. FILINGS OF THE PARTIES

3. American Satellite's proposal for domestic communications satellite facilities envisions a three phase approach. Phases II and III call for space segment facilities owned by American Satellite, and covering applications are pending before us.[1] As part of Phase I, American Satellite proposes to lease from Telesat up to 3 transponders for full period use and additional transponder channels for occasional use on Telesat's ANIK satellites for a period of up to one year with an option to renew for shorter periods. A Memorandum between American Satellite and Telesat is appended to the application, and negotiations to finalize the terms of a definitive lease agreement are currently in progress. American Satellite states that the transponder channels leased from Telesat are to be used in conjunction with four two-way earth stations, located in the vicinity of New York, Chicago, Dallas and Los Angeles (File Nos. 65, 67, 68 and 70–DSE–P–71), which would later be modified and used as part of Phase II of its proposed system along with additional earth stations. According to American Satellite:

> By commencing its short-term Phase I operation during the latter part of 1973 on the Telesat ANIK satellite—which is almost identical to the 12-channel satellite to be procured by American Satellite for use during Phase II of its system—American Satellite will be able to demonstrate at an early date the technical characteristics of its own system while providing commercial services. Also, operating experience will be gained and system performance verified at an early date.

4. Except for Western Union, those commenting on the American Satellite Phase I application generally support the proposal as being in the public interest and basically consistent with the Understanding concluded between the United States and Canadian Governments on November 8, 1972 (Department of State Bulletin, Vol. LXVIII No. 1754 pp. 145–148). The RCA applicants, TelePrompTer, and General Electric—all of which have applications pending that contemplate temporary use of the Telesat system—urge that permitting initial use of the Canadian space segment pending the availability of suitable domestic facilities will provide to the public the benefits of satellite communications at an earlier date than would otherwise be possible and enable an accumulation of operating experience and a refinement of technical characteristics before United States domestic satellites are operational. The RCA applicants further state that the urgent need for additional public telephone service in the State of Alaska constitutes a compelling public interest consideration in support of permitting interim use of the Canadian facilities.

5. Telesat has filed comments urging us to approve use of its facilities by qualified applicants under the terms and conditions of the

[1] See File Nos. 1–3–DSS–P–73 and 19, 20, and 21–DSS–P–71. American Satellite was granted a waiver of Section 319 of the Communications Act to permit it to enter into a contract for procurement of the satellites for Phase II (1–3–DSS–P–73) at its own risk, on February 14, 1973.

inter-Governmental Understanding of November, 1972 (see paragraph 4 above). Telesat takes the position that the memoranda of agreement it has entered into with American Satellite and RCA fall squarely within the terms of that Understanding. It states further that: "Subject to the availability of adequate capacity, Telesat would be willing to furnish capacity, on a non-discriminatory basis, for use by other U.S. carriers on terms and conditions similar to those in the RCA and American Satellite memoranda." Telesat also states that Canadian authorities are now prepared to approve its proposed arrangements with American Satellite and RCA. We have received corroboration of this statement from the Canadian Deputy Minister of Communications.

6. In opposition, Western Union claims that:

(a) The use of foreign satellites in providing domestic common carrier communications service is not in the national interest;

(b) The application is premature and deficient in information and material required by the Communications Act and the Commission's rules and policies; and

(c) Substantial questions are unresolved concerning competition between international and domestic record communications carriers and the applicability of Section 222 of the Communications Act.

More specifically, Western Union urges that there is no public need for the operation of a common carrier domestic communications service through the use of satellites owned by Telesat and that implementation of a proposal such as American Satellite's could inhibit our guidance of domestic satellite service towards attainment of significant national objectives. It asserts that approval of such temporary usage of Telesat's satellites would present an unfair competitive situation to domestic carriers proposing to utilize their own satellites, and might retard the latter's efforts. Western Union takes the position that the public should not obtain domestic satellite service until it is in a position to purchase such service via facilities entirely owned by a United States carrier.

II. DISCUSSION AND CONCLUSIONS

7. We are of the opinion that the national public interest would be served by the adoption of a policy permitting temporary use of the Telesat satellites by qualified applicants under the terms and conditions set forth in the inter-Governmental Understanding of November 8, 1972 (Department of State Bulletin, Vol. LXVIII No. 1754, pp. 145–148).[2] The 1970 *Report and Order* in Docket No. 16495 (22 FCC 2d 86) recognized in paragraph 22 that it might be "beneficial to explore areas of mutual cooperation to reduce costs, enhance efficiency and share the results of operating experience," as well as the "possibility of a shared use of the space segment of a United States system or systems to serve the domestic requirements of another country or countries, or vice versa." Such a policy would promote our objective to "maximize the opportunities for the early acquisition of technical, operational, and marketing data and experience in the use

[2] It is to be noted insofar as the TelePrompTer and General Electric applications are concerned, that the comments of Telesat state that "the arrangements have been limited by Telesat to U.S. carriers and Telesat has not established direct relationships with potential U.S. end users."

of this technology as a new communications resource for all types of services" (*Second Report and Order* in Docket No. 16495, 35 FCC 844, 846). It might also be of assistance in partially meeting at an early date the pressing needs of the State of Alaska for improved intrastate communications service (see *Second Report*, paragraph 41). We have a longstanding policy in favor of the use of non-United States facilities to meet United States needs pending construction of United States facilities or to provide diversity or redundancy (e.g., CANTAT I and II (FCC 72–613), and COMPAC, etc.)

8. Western Union's bare, unsupported assertions of public detriment do not, in our judgment, offer persuasive grounds for barring temporary use of the Telesat space segment by qualified applicants. Western Union has a headstart over other system applicants proposing ownership of space segment facilities because it was granted a partial waiver of Section 319 of the Communications Act to permit advance procurement of satellites at the applicant's own risk (FCC 72–686). We made such a grant in order to permit Western Union to achieve significant price and schedule benefits and to expedite the opportunity for what then appeared to be a feasible proposal.[3] Similarly, under our policy of competitive entry, we should and will give favorable consideration to others who propose workable plans for bringing service via satellite facilities to our domestic users. Certainly, it would be a contradiction for us to hold that our policy of competitive entry contemplates that any domestic satellite applicant or licensee will be afforded any measure of protection against the early provision of specialized communications satellite services to the public by others (except to the extent specified in paragraphs 24–33, and 42–47 of the *Memorandum Opinion and Order* of December 22, 1972 in Docket No. 16495 (FCC 72–1198). Indeed, in *Specialized Common Carrier Services*, 29 FCC 2d 870 920, we made "clear that we will examine very critically any future oppositions by pending applicants to proposed new entry by others." Moreover, Western Union's petition implies that all domestic satellite system applicants will be competing for identical communications markets. There is no basis for this assumption. All system proposals are not identical and will not have identical service capabilities. The interest of the public in being accorded an opportunity for early access to domestic communications satellite service and in having a wider choice as to how best to satisfy its expanding and diverse specialized requirements clearly outweighs the private competitive interests of Western Union.

9. The American Satellite proposal falls within the terms and conditions of the inter-Governmental Understanding. The temporary nature of the arrangement is evidenced by the circumstances that: (1) American Satellite has pending applications for its own space segment and has been granted a waiver of Section 319 for procurement of the satellites, and (2) the term of the lease from Telesat is for a period of up to one year with options to renew for shorter periods. We will condition any grant of the above-captioned applications upon a requirement

[3] In granting Western Union construction permits for the satellites, we noted that its traffic forecasts were based on traffic to be generated primarily from its existing services and that Western Union estimated that such forecasted traffic would earn revenue over the entire seven year period exceeding its total revenue requirements for the system. Order and Authorization, paragraph 3 (FCC 73–26).

that American Satellite obtain prior approval from this Commission before exercising any renewal option and our determination in this respect will be made in the light of the circumstances then prevailing, including the availability of space segments authorized to United States entities. The same condition would obtain to any grant of the RCA application. All applicants proposing to lease transponder capacity from Telesat will be required to make a satisfactory showing as to the temporary nature of the arrangement, although such showing need not necessarily be the same as that made by American Satellite so long as it comports with the terms and conditions of the inter-Governmental Understanding.[4] Where such proposed use is by a carrier, a major consideration will be whether the carrier has pending, and is actively pursuing, an application for a domestic space segment. While Telesat has not yet established direct relationships with potential United States end users (see footnote 2 above), our approval of any such end user utilization of the Intelsat space segment, in the event that it should be permitted by Telesat, would be conditioned upon a requirement that the end user transfer to a United States space segment upon the availability of such facilities, in the absence of a showing of good cause.

10. As noted at the outset, we do not here determine whether American Satellite, the RCA applicants, TelePrompTer or GE are in fact qualified or whether their proposals would otherwise serve the public interest, and hence do not pass upon the merits of Western Union's allegations with respect to the alleged deficiencies in the information supplied by American Satellite and its qualifications under Section 222 of the Communications Act. However, a few additional comments appear in order in view of the nature of various contentions made by Western Union, CML and the RCA applicants.

11. First, the mere circumstance that American Satellite may not yet have supplied all of the information which we may deem necessary to consideration of its application does not mean that the application should be dismissed or designated for evidentiary hearing. We would expect American Satellite to respond fully to any request by the Commission for further information to facilitate processing of its application. Our domestic satellite policies would not be served by dismissal or designation for evidentiary hearing unless (a) the applicant fails timely to supply information requested by the Commission or (b) there appears to be a significant factual issue requiring resolution through confrontation and cross-examination of witnesses. See *Specialized Common Carrier Services*, 29 FCC 2d 870, 896–900.

12. Second, the request of the RCA applicants that we decline to act on the American Satellite proposal prior to taking action on the RCA proposal is rejected as contrary to the public interest. As stated in the *Public Notice* re processing procedures for domestic satellite applica-

[4] We see no basis for Western Union's arguments that the American Satellite proposal should be barred on the ground that it allegedly involves "adverse balance of payment aspects" and would subject a United States carrier to some control by a foreign government. The situation posed here is not materially different from that posed by the use made regularly by United States carriers of foreign cables (see paragraph 7 above), and is in accord with the inter-Governmental Understanding and our policy goals in the domestic field.

tions (FCC 72–992), processing will proceed on an individual basis at a "pace geared to the speed at which each applicant makes any additional showings or amendments * * * [consistent with the policies adopted in Docket No. 16495] that may be required by the Commission or desired by the applicants * * *." We will, of course, make every effort to give each applicant prompt consideration in the interest of making domestic satellite services available to the public at the earliest practicable time.

13. Finally, we find no reason to adopt the suggestion of CML that authorizations for United States use of Canadian satellite capacity should be granted only when an appropriate understanding for a reciprocal arrangement has been reached with Canadian officials. There is no application or specific request before us for the use of United States domestic space segments by Canadian entities. Moreover, the inter-Governmental Understanding of November 8, 1972 appears adequately to cover this possibility, which should be determined when the pertinent factors are known. We adhere to the view expressed in our 1970 Report in Docket No. 16495 and in the 1972 inter-Governmental Understanding that it would be in the interest of both our countries not to preclude our domestic satellite communications systems from providing assistance to one another in appropriate circumstances. See examples set forth in the Department of State letter dated November 7, 1972 incorporated in the inter-Governmental Understanding. Our policy in this area contemplates the possibility of authorizing temporary usage of available United States satellite capacity by Canadian entities in accordance with the Understanding, upon appropriate request.

14. Accordingly, IT IS ORDERED That the "Petition to Dismiss or Designate for Evidentiary Hearing" filed by Western Union IS DENIED to the extent reflected herein and IS OTHERWISE HELD IN ABEYANCE for consideration in conjunction with action on the above-captioned applications.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-414

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re BIG VALLEY CABLEVISION, INC., STOCKTON, CALIF. For Certificate of Compliance	CAC-1345 CA482

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1973; Released April 26, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. On October 5, 1972, Big Valley Cablevision, Inc., filed an application (CAC-1345) for a certificate of compliance for a new cable television system at Stockton, California (located in the 25th television market). Big Valley proposes to carry the following California television signals: KCRA-TV (NBC), KXTV (CBS), KTXL (Ind.), KVIE (Educ.) and KMUV-TV (Ind.), Sacramento; KOVR (ABC), Stockton; KLOC-TV (Ind.), Modesto; KQED (Educ.), KBHK-TV (Ind.) and KEMO-TV (For. Lang.), San Francisco; and KTVU (Ind.), Oakland. Big Valley's application is opposed by Great Western Broadcasting Corp., licensee of Television Broadcast Station KXTV, Sacramento, California; Central California Educational Television, licensee of Television Broadcast Station KVIE, Sacramento, California; Tel-Vue Stockton, Inc.; California Antenna T-V, Inc.; and Big Valley has replied.

2. In its opposition, Tel-Vue argues that the City of Stockton franchise procedure should be declared void and the City of Stockton be required to solicit new bids. Tel-Vue states that the Ordinance under which the City received bids on July 26, 1971, was substantially amended on August 7, 1972, when the franchise was issued, to conform with the Commission's newly issued cable television regulations. And, Tel-Vue argues, that in *Springfield Television, Inc.* v. *City of Springfield, Mo.*, 462 F. 2d 21 (8th Cir. 1972), the Court held that conditions upon which bids were solicited for a cable television franchise for Springfield, Missouri, had been significantly changed by issuance of the Commission's franchise standards, and that, accordingly, any further attempt by the City of Springfield to grant a franchise could be accomplished only by a new solicitation of bids on terms in compliance with present Commission standards.

3. We reject Tel-Vue's argument. Our franchise standards require only that a franchisee's qualifications be evaluated by the franchising authority as part of a full public proceeding. A detailed chronology of the numerous public City Council franchise proceedings, submitted

herein by the Assistant City Attorney for the City of Stockton, shows that there was a full public proceeding. The matters raised by Tel-Vue are properly raised before the local franchising authority or the local courts. In *Springfield, supra*, for example, the Court held that the franchise issued in violation of local law. But in this case, no violation of local law is claimed.

4. In its opposition, California Antenna, in addition to stating the objection rejected in paragraph 3, above, argues that Big Valley's franchise is inconsistent with Commission standards because it contains (a) no statement requiring Big Valley to establish a local office in the community; (b) no statement requiring that modifications of Section 76.31 of the Rules be incorporated in the manner established by Section 76.31(a)(6) of the Rules, and (c) a requirement by the City of Stockton of four government access channels, which is in excess of the requirements of Section 76.251 of the Rules.

5. We reject California Antenna's objection for the following reasons: (a)(b) in its application, Big Valley assures us that it maintains a local office as required by the rules, and that any future amendment of Section 76.31 of the Rules will be incorporated in the franchise. We find these assurances adequate. See *Sapulpa Cable Television*, FCC 72–1106, 38 FCC 2d 584, *reconsideration granted*, FCC 73–279, —— FCC 2d ——; (c) the franchise issued by Stockton on August 7, 1972, contains access requirement fully consistent with Section 76.251 of the Commission's Rules.

6. In its opposition, Central California Educational Television argues that carriage of KQED will cause KVIE harm for the following reasons: (a) Big Valley's franchise area is in the core of KVIE's coverage area where it obtains financial support; (b) KQED and KVIE have agreed to keep out of each other's core coverage area and Big Valley's franchise area is encompassed by KVIE's predicted Grade A contour; and (c) because KQED's program schedule duplicates a substantial portion of KVIE's schedule, importation will inevitably erode local support for KVIE among Big Valley's cable subscribers. These arguments will be rejected. (a)(c) Station KQED places a predicted Grade B contour over Big Valley's franchise area, and Central California's petition has not presented factual evidence of economic harm that persuades us that a departure from our general rule is appropriate. Par. 12, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 330. *Inter alia*, we note that KVIE is entitled to simultaneous network program exclusivity vis-a-vis KQED, pursuant to Section 76.91 of the Commission's Rules; and (b) we note that this Commission does not give effect to private agreements between educational broadcasters to divide their audiences. E.g., *Information Transfer, Inc.*, FCC 72–1094, 38 FCC 2d 335.

7. In its opposition, Great Western argues that Big Valley's proposed carriage of KEMO–TV is not consistent with Section 76.61(e) of the Rules [1] because it is not a predominantly foreign language sta-

[1] Section 76.61(e) of the Rules provides that, "In addition to the television broadcast signals carried pursuant to paragraphs (a) through (d) of this section, any such cable television system may carry any television stations broadcasting predominantly in a non-English language."

tion. Great Western gives an example of an English language program which it claims may signify a switch by KEMO–TV from foreign to English language programs. Great Western asks that if the Commission grants Big Valley's application it restrict KEMO–TV carriage to only those programs which the station broadcasts in a foreign language. This argument is rejected since Great Western has not persuaded us to vary the clear language of Section 76.61(e) of the Rules in order to limit KEMO–TV's carriage to only non-English language programs. It appears from the information supplied that KEMO–TV qualifies as a predominantly non-English language station within the meaning of Section 76.61(e) of the Rules.[2] See *Big Valley Cablevision, Inc.*, FCC 73–187, —— FCC 2d ——, *reconsideration pending.*

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application For Certification" (CAC–1345) filed October 5, 1972, by Big Valley Cablevision, Inc., IS GRANTED, and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the "Objection of Great Western Broadcasting Corp. Pursuant to Section 76.27" filed December 14, 1972, by Great Western Broadcasting Corp., IS DENIED.

IT IS FURTHER ORDERED, That the "Objections To Carriage and Request For Special Relief" filed December 14, 1972, by Central California Educational Television, ARE DENIED.

IT IS FURTHER ORDERED, That the letter opposition filed October 11, 1972, on behalf of Tel-Vue Stockton, Inc., IS DENIED.

IT IS FUTHER ORDERED, That the "Opposition to Application" filed December 13, 1972, by California Antenna T–V, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] In its most recent application, the licensee of KEMO–TV represented that,
Applicant expects to operate Station KEMO–TV predominantly as a foreign language facility. Each foreign language personality will have the responsibility of gathering and presenting news pertinent to his particular following. For example, the Japanese broadcaster will gather news items of interest to the Japanese community, the Portuguese man will gather items of interest to the Portuguese community, etc. (File No. BALCT–455).

F.C.C. 73-432

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THOMAS H. BOWEN, VANCOUVER, WASH. Order to Show Cause Why the License for Radio Station KNC-0979 in the Citizens Radio Service Should Not Be Revoked.	Docket No. 19252

MEMORANDUM OPINION AND ORDER

(Adopted April 25, 1973; Released May 2, 1973)

BY THE COMMISSION: COMMISSIONERS REID AND WILEY ABSENT.

1. We have before us for consideration an application for review filed December 5, 1972, by the Chief, Safety and Special Radio Services Bureau, seeking review of a Review Board Decision, 37 FCC 2d 839, released November 6, 1972. The application is unopposed. Since the pleading filed by the Bureau presents important questions which merit our attention, the application for review is granted.

2. The principal events which form the basis of this proceeding occurred on January 20, 1971 and involve alleged acts of interference with the use of the radio facilities licensed to the Port of Portland, Oregon (formerly the Commission of Public Docks). The Port of Portland (hereinafter the Port) was issued a license for station KRC-1423 in the Citizens Radio Service on September 8, 1970 and commenced operations on Channel 13 during November, 1970. A complaint received by the Commission charges that on January 20, 1971, and upon a number of occasions prior thereto, the Port received such severe interference on its radio in the form of music and other sounds that it was unable to communicate with its mobile units. An investigation was conducted by Commission personnel which included a discussion of the subject matter of the complaint with Bowen. As a result of that investigation, it was believed that Bowen was the cause of the interference and a Notice of Violation was issued on January 22, 1971. In a response dated January 29, 1971, the licensee denied "all parts of this violation notice." He further asserted that he was being harassed because of a complaint he had filed against the Port; that if the investigating officer had "turned my radio on, he would have heard all the things he has accused me of."

3. Pursuant to delegated authority, the Chief, Safety and Special Radio Services Bureau, issued an order directing the licensee to show cause why his license for station KNC-0979 in the Citizens Radio Service should not be revoked (SS 303-71, released May 7, 1971).

Therein, it was charged that the licensee had committed five specific violations of the Commission's Rules;[1] that he had a past history of rule violations and that "the Commission would be warranted in refusing to grant a Citizens radio station license to licensee if his original application were now before it." In an answer to the Show Cause Order dated May 12, 1971, Bowen again denied any wrongdoing, stating "it was not I or my equipment doing as I have been accused." He requested a hearing which was held at Vancouver, Washington, on July 12, 1971.

4. At the hearing, Bowen explained for the first time that while he had done nothing to interfere with the Port's radio operations on January 20, 1971, he and other undisclosed individuals had agreed upon a plan to cause such interference. Pursuant to this plan, Bowen acted as a decoy on January 20, 1971 while some other member or members of the group actually caused the interference. Bowen admitted that he had monitored the interference from time to time but denied that he had transmitted any interfering noises over his station on the aforementioned date.

5. The Administrative Law Judge who presided at the hearing held in an Initial Decision, 37 FCC 2d 844, released December 17, 1971 that Bowen had not used Citizens radio station KNC–0979 on January 20, 1971 in the manner or for the purposes set forth in the Order to Show Cause and had committed none of the rule violations charged therein; and he concluded that Bowen's license should not be revoked. On appeal pursuant to exceptions to the Initial Decision filed by the Bureau, the Review Board differed in some respects from the views expressed by the Administrative Law Judge but nevertheless agreed with his conclusion that Bowen's license should not be revoked. Pointing out that it is undisputed that Bowen did not commit any of the rule violations specified in the Show Cause Order and that no action was taken to either modify the outstanding order or to issue a new one when this became apparent, the Board concluded that "under the circumstances here, the Board perceives no basis for revoking Bowen's license pursuant to the Order to Show Cause issued in this proceeding." The Board further stated that it was expressing no opinion as to what its ultimate conclusion would have been "had different issues been specified or had the present issues been modified." It was further held in the Decision that:

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[1] The Order to Show Cause alleged that on January 20, 1971, Citizens radio station KNC–0979 (Thomas Bowen):

a. was used for the express purpose of maliciously interfering with the communications of Citizens radio station KRC–1423, licensed to Commission of Public Docks, Portland, Oregon, in willful violation of Section 95.83(a)(8) of the Commission's Rules;

b. was used for the transmission of superfluous communications, i.e., not necessary to communications which are permissible, in willful violation of Section 95.83(a)(10) of the Commission's Rules;

c. was used for the transmission of music, i.e., retransmission of Standard Broadcast Station KWJJ, Portland, Oregon, in willful violation of Section 95.83(a)(11) of the Commission's Rules;

d. was used for continuous and uninterrupted transmissions not limited to permissible communications for a period of approximately forty minutes, in willful violation of Section 95.91(a) of the Commission's Rules; and

e. was not identified by its assigned call sign during a substantially continuous transmission for a period of approximately forty minutes, in willful violation of Section 95.95(c) of the Commission's Rules.

> While the Board does not condone Bowen's behavior, the record does not reflect that he concealed or misrepresented any facts to the Commission either in his testimony or his pleadings, and, in the absence of a specific charge any proof of violation of some particular Commission Rule, statute or other law, we do not believe that general allegations of conspiracy or conduct contrary to the public interest afford any basis for revoking Bowen's license in this proceeding. (37 FCC 2d at 842)

6. In its application for review, the Bureau contends that even though Bowen was not guilty of the rule violations charged in the Order to Show Cause, his license is nevertheless subject to revocation by reason of other misconduct established by the record in this proceeding. Asserting that Bowen participated in a group effort or conspiracy to cause interference to the Port's radio operation in violation of Section 95.83(a)(8) of the Rules,[2] failed to reveal his function as a decoy either to the Commission's investigator on January 20, 1971, or in his written submissions to the Commission, and engaged in other improper activities, the Bureau urges that such conduct reflects adversely on his character qualifications and demonstrates that he does not meet the requisite public interest standards to become or to continue as a Commission licensee. In view of the foregoing, the Bureau argues that Bowen's license is subject to revocation under Section 312(a)(2) of the Act which provides that a station license may be revoked "because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application."

7. This contention of the Bureau, even if accepted, does not affect the validity of the rationale which underlies the Board's decision; i.e., that revocation cannot be based on the Order to Show Cause as presently worded and the Bureau took no corrective measures to either issue a new order or seek modification of the existing one when the true situation was revealed. The Bureau concedes that Bowen did not use his Citizens radio station to interfere with the Port's transmissions, and that he was not guilty of any the rule violations specified in the Show Cause Order; and the alleged acts of misconduct with respect thereto manifestly may not be considered in determining whether respondent's license is subject to revocation. The only significant charge remaining in that Order is the general one that the Commission "would be warranted in refusing to grant a Citizens radio station license to licensee if his original application were now before it" but no specific acts of wrongdoing or other factual allegations which would justify such action are set forth. However, Section 312 of the Act which governs these proceedings expressly requires in subdivision (c) thereof that an order to show cause "contain a statement of the matters with respect to which the Commission is inquiring" and the licensee is called upon to answer and give evidence only "upon the matters specified therein." Like provisions are contained in Section 1.91 of the Commission's Rules. Clearly, the requirements of the statute and the rule are

[2] Section 95.83(a)(8) provides that a "citizens radio station shall not be used: . . . [t]o interfere maliciously with the communications of another station."

not met by a charge that a denial of license would be warranted and a revocation therefore justified, where the show cause order is devoid of any statement concerning the conduct or the acts which are claimed to be improper and where no notice is given to the licensee that character is in issue. To the extent, therefore, that the Review Board held that the Order to Show Cause should have been modified or a new one issued on the basis of Bowen's testimony in order to sustain a revocation order in this proceeding, its holding is correct.

8. The Board erred, however, in its further statement that there must be a "violation of some particular Commission Rule, statute or other law" to support revocation of a license. Neither Section 312 nor case precedent supports such a restrictive view of the Commission's authority to revoke a station license. In addition to Section 312(a)(2) set forth above, the Act authorizes in Section 312(a)(3) a revocation "for willful or repeated failure to operate substantially as set forth in the license." Thus, the authority conferred upon the Commission by the Act to revoke a station license is not confined to situations where the licensee violates a law or a rule, which is covered by subdivision (4) of Section 312(a), but is much broader; and we so held in *KWK Radio, Inc.*, 34 FCC 1039 (1963) affirmed *sub nom. KWK Radio, Inc.* v. *FCC*, 337 F. 2d 540, 119 U.S. App. D.C. 145, cert. denied 380 U.S. 910.

9. In *KWK*, the show cause order contained no reference to the violation of any particular law or rule but did allege acts concerning the station's conduct with respect to the operation of certain treasure hunts and Bonus Club contests. Such conduct, it was charged, indicated that the operation was contrary to the public interest and that the licensee had willfully and repeatedly failed to operate substantially as set forth in its license. Holding that the license should be revoked the Commission stated (34 FCC at 1041):

> 6. On the foregoing facts alone relating to the fraudulent treasure hunts, we believe that there had been affirmatively established (1) conditions which would warrant us in refusing to grant a license or permit on an original application, and (2) willful and repeated failure to operate in accordance with the terms of a license. The perpetration of deliberate frauds upon the public is patently and flagrantly contrary to the public interest and cannot be countenanced if we are to carry out the functions entrusted to us. Knowledge that an applicant would engage in such conduct would obviously warrant denial of an original application, and such conduct certainly is not to be considered as in keeping with the terms of a license to operate in the public interest. We, therefore, conclude that we may lawfully issue a revocation order under section 312(a)(2) and (3) of the Communications Act.

10. Therefore, the absence of a specific charge and proof of violation of a particular law or rule does not preclude the revocation of a license as stated by the Board. However, the licensee must be provided with a statement of the charges against him and the outstanding Order to Show Cause in this case must be modified to meet this requirement and the licensee afforded an opportunity to be heard under the modified Order. The licensee is herein placed on notice that his character is at issue in this proceeding and that his participation in any agreement, plan, or conspiracy to interfere with the radio operations of

the Port or any acts of interference committed pursuant to such agreement, plan, or conspiracy may be made the basis for a revocation order under Section 312(a)(2) and/or (a)(3) of the Act. On the basis of the evidence presently of record and such additional evidence as may be presented at any further hearing held in this case, the following matters should be determined:

(a) All of the facts and circumstances concerning any agreement, plan, or conspiracy on the part of individuals to interfere with the Port's radio operations or to violate Section 95.83(a)(8) of the Commission's Rules; the extent, if any, to which the licensee participated in any such agreement, plan, or conspiracy to interfere with the Port's radio operations; and any acts committed by the licensee either alone or in conjunction with other individuals pursuant to or in furtherance of such agreement, plan, or conspiracy.

(b) Whether the licensee made willful misrepresentations, concealed material facts, or was lacking in candor in his statements to the Commission's investigating officer or in written submissions to the Commission with respect to the interference caused to the radio operations of the Port on January 20, 1971.[3]

(c) Whether the licensee possesses the requisite character qualifications to continue as a licensee of the Commission.

(d) Whether, in light of the evidence adduced in this proceeding, the license of the licensee is subject to revocation under Section 312(a)(2) and/or Section 312(a)(3) of the Communications Act of 1934, as amended; and whether the said license should be revoked.

11. Accordingly, IT IS ORDERED, That the application for review filed by the Chief, Safety and Special Radio Services Bureau, on December 5, 1972, IS GRANTED; that the Decision of the Review Board, 37 FCC 2d 839, released November 6, 1972 is VACATED; that the Order to Show Cause, SS–303–71, IS MODIFIED as set forth herein; that this proceeding IS REMANDED for further hearing as set forth in paragraph 10 of this Memorandum Opinion and Order, and for such other and further action as may be necessary and proper; and that a copy of this Memorandum Opinion and Order SHALL BE SENT by Air Mail, Registered, and Return Receipt Requested, to the licensee at his last known address.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[3] Although the Review Board stated that the record did not reflect any concealment or misrepresentation of facts to the Commission by Bowen, we believe that the matter should be considered *de novo* under this issue.

109-037—73——2

F.C.C. 73-378

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re BUTTE TELEVISION CO., INC., BUTTE, MONT. For Certificate of Compliance	CAC-161 (MT001) SR-12703

MEMORANDUM OPINION AND ORDER

(Adopted April 4, 1973; Released April 17, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER WILEY CONCURRING IN THE RESULT; COMMISSIONER HOOKS DISSENTING AND ISSUING A STATEMENT IN WHICH COMMISSIONER REID CONCURS.

1. Butte Television Company, Inc., operates a cable television system in Butte, Montana and, pursuant to Section 76.11(a) and 76.13 (b) of the Commission's Rules, seeks certification for carriage of Station KWGN-TV (Ind., Channel 2) Denver, Colorado.

2. Butte Television currently is carrying the following television signals on its cable system:

KUTV (NBC, Channel 2), Salt Lake City, Utah.
KCPX-TV (ABC, Channel 4), Salt Lake City, Utah.
KSL-TV (CBS, Channel 5), Salt Lake City, Utah.
KXLF-TV (ABC/CBS, Channel 4), Butte, Mont.
KTVM (NBC/ABC, Channel 6), Butte, Mont.
KBLL [1] (NBC/ABC, Channel 12), Helena, Mont.
KUED (Educ., Channel 7), Salt Lake City, Utah.
CJOC-TV (Ind., Channel 7), Lethbridge, Alberta, Canada.

3. The Butte, Montana television market is a smaller market. Therefore, in accordance with Section 76.59(b) of the Rules, the Butte cable system is entitled to carry the signals of a full network station of each of the major television networks and one independent station. The Butte Television system already carries this complement of signals. However, Butte Television contends that carriage of Station KWGN-TV is consistent with Section 76.65 of our Rules, which provides that an existing system authorized to carry a television broadcast signal prior to March 31, 1972 is not required to delete that signal from carriage. Butte Television bases its contention on an uncontested notice of its intent to carry KWGN-TV filed on November 6, 1970, pursuant to former Section 74.1105 of the Rules.

[1] Television Broadcast Station KBLL is carried on a part-time basis, according to the Butte Television Company application.

4. An opposition to the application has been filed by Garryowen Butte T.V., Inc., licensee of Station KXLF–TV, Butte, Montana, and raises three objections: (i) that carriage of KWGN–TV was not authorized prior to March 31, 1972 and therefore would have to be justified as being otherwise consistent with our Rules; (ii) that by not serving Butte Stations KXLF–TV and KTVM with copies of its application for a certificate of compliance, petitioner did not satisfy the service requirements set forth in Section 76.13(b)(1) of the Rules; and (iii) that the proposed signal carriage would cause significant fractionalization of the KXLF–TV viewing audience and thereby inflict economic injury upon Garryowen's operation.

5. Applicant explains that on November 6, 1970, it filed a notification of its intent to carry Station KWGN–TV on its cable system, pursuant to former Section 74.1105 of the Rules. There was no objection to this notice. Subsequently, on December 4, 1970, Butte Television filed a petition for special relief (SR–12703) requesting waiver of the proposed rules specified in Docket No. 18397, 15 FCC 2d 417 (1968), to carry KWGN–TV. This petition drew an untimely objection on January 21, 1971, from KMSO, Inc., licensee of Station KTVM, Butte, Montana. On March 30, 1972, KMSO requested by letter to the Commission that its objection be withdrawn. This letter was received at the Commission on March 31, 1972 and the objection was accordingly dismissed on May 16, 1972. Because the KMSO objection to Butte Television's petition for special relief was dismissed, only an uncontested notification filed pursuant to former Section 74.1105 of the Rules by Butte Television remains. In the *Cable Television Report and Order*, 36 FCC 2d 143, at 185, fn. 58, we stated that signals authorized by operation of the provision of former Section 74.1105 and not inconsistent with former Section 74.1107 would be considered grandfathered signals for the purpose of Section 76.65 of the Rules. We find that KWGN–TV is an authorized signal on the Butte system and may be carried pursuant to Section 76.65.

6. Amendments filed on November 22, 1972, December 1, 1972, and January 19, 1973 by Butte Television supplied the necessary information to comply with the service requirements of Section 76.13(b)(1) of the Rules, thereby rendering Garryowen's second objection moot.

7. With respect to Garryowen's argument that carriage of KWGN–TV would result in fractionalization of the KXLF–TV market, applicant argues that the mere assertion of adverse impact is not sufficient to warrant relief. We agree. The new cable television rules already embody our careful consideration of economic impact. As we noted in paragraph 91 of the *Cable Television Report and Order*, while we may pay special heed to such arguments on behalf of smaller market broadcasters, we will require supportive detailed showings. We have received no such showing and therefore see no reason to grant the relief.

Accordingly, IT IS ORDERED, That the captioned application for a certificate of compliance filed by Butte Television Company, Inc., IS GRANTED, and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the "Petition for Special Relief" filed by Butte Television Company, Inc., pursuant to former Section 74.1109 of the Commission's Rules, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER BENJAMIN L. HOOKS, IN WHICH COMMISSIONER CHARLOTTE T. REID CONCURS

In Re: Certificate of Compliance for Butte Television Co., Inc., Butte, Mont. (CAC–161).

The action taken by the Commission today in this matter is wrongfully premised upon a bare intent of the operator to carry KWGN, Denver—an intent which, beyond giving notice thereof, pursuant to old Section 74.1105, was never carried out. I do not believe the Cable Rules contemplated "grandfathering" on intended signal carriage; rather those rules were established to avoid an interruption to existing service. Nowhere in the pleadings filed in this matter has anyone claimed that KWGN was viewed or carried on the Butte system and that equity requires its continued carriage.

F.C.C. 73-413

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re CLEVELAND AREA TV, INC., PARMA, OHIO For Certificate of Compliance	CAC-1081 OH271

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1973; Released April 26, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT.

1. On August 25, 1972, Cleveland Area TV, Inc., filed the above-captioned application for certificate of compliance to begin cable television service at Parma, Ohio, a community of approximately 100,216 persons located in the Cleveland-Lorain-Akron, Ohio, television market. Cleveland Area TV proposes to carry the following television broadcast signals: WKYC-TV (NBC), WEWS (ABC), WJW-TV (CSB), WVIZ-TV (Educ.), WKBF-TV (Ind.), all Cleveland, Ohio; WAKR-TV (ABC), Akron, Ohio; WUAB (Ind.), Lorain, Ohio; WKBD-TV (Ind.), Detroit, Michigan; and CKLW-TV (Ind.), Windsor, Ontario, Canada. There is no opposition to the application.

2. On July 20, 1972, the Parma City Council issued a franchise to Cleveland Area TV, and on March 12, 1973, this franchise was reissued to incorporate several changes. Section 15(b)(6) of the franchise now requires "that the CATV system as installed has a minimum capacity of 26 channels." In fn. 25, *Reconsideration of Cable Television Report and Order* FCC 72-530, 36 FCC 2d 326, 355, we stated that a local governmental body may not require more than twenty channel capacity unless there is a "demonstration of need for such channel capacity and the system's ability to provide it." Cleveland Area TV states that the system at Parma would have had a 26-channel capacity regardless of Section 15(b)(6) of its franchise, because amplifiers incorporating the latest state of the art have 26-channel capacity, and it normally installs such amplifiers in its new cable television systems. In these circumstances, we believe it appropriate to waive the requirement for a demonstration of need for channel capacity of more than twenty channels. The franchise poses no other apparent inconsistencies with our rules.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application for Certificate of Compliance" (CAC–1081) filed by Cleveland Area TV, Inc., IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-405

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of COMPARABLE TELEVISION TUNING	}	Docket No. 19722

NOTICE OF PROPOSED RULE MAKING

(Adopted April 18, 1973; Released April 20, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT; COMMISSIONER REID CONCURRING IN THE RESULT.

1. Notice is hereby given that the Commission proposes to amend § 15.68(d)(3) of the comparable television tuning rules to provide two alternative methods for achieving comparable tuning when a 70-position UHF detent tuner is utilized in a receiver. The first method, applicable to all receivers, involves eliminating the need for routine fine tuning of UHF and VHF channels. The second method, applicable only to monochrome receivers, requires that the UHF channel selection controls position the tuner within ±1 MHz of correct frequency and that UHF and VHF fine tuning speed be the same.

2. The first method of compliance with the comparable tuning rules is a restatement of present § 15.68(d)(3) in terms of the end result required—elimination of the need for routine fine tuning—rather than the means. The word "routine" means that it may be desirable or even necessary to fine tune channels when the receiver is first purchased and to "touch up" the fine tuning occasionally thereafter, but that it should not be necessary or desirable to fine tune any channel when switching from one channel to another on a day-by-day basis. The customary method of eliminating the need for fine tuning is to equip the receiver with automatic frequency control (AFC) circuitry and with channel selection mechanisms capable of positioning the UHF and VHF tuners within the pull-in range of AFC circuitry with which the receiver is equipped. However, any method which eliminates the need for routine fine tuning on all channels would be acceptable.

3. A 70-position UHF detent tuner accurate to ±1 MHz (as measured by maximum deviation from correct frequency in kilohertz) in combination with AFC circuitry now being utilized is considered to meet this requirement. With this tuning equipment, it is theoretically possible, on a given receiver, in a given community, that one available channel will be off frequency by +1 MHz and that a second will be off by −1 MHz. Given this situation and an undesirable setting of the fine tuning control, all available UHF stations would not be within the pull-in range of AFC. However, this combination of factors is very unlikely and is readily correctable by fine tuning adjustment and is

therefore not viewed as a reason for rejecting use of this combination of equipment for compliance with the comparable tuning requirement.

4. The second method of compliance is new, providing an alternative to the use of AFC circuitry in monochrome receivers.[1] It is based on a November 7, 1972 letter from a tuner manufacturer advising the Commission that it had developed a 70-position non-memory UHF detent tuner accurate to ±1 MHz with a tuning speed of 22 kilohertz per degree of rotation. (A copy of the letter is being entered in the Docket file.) Tests of samples from a limited production run show that accuracy on most channels is appreciably better than the outside permissible ±1 MHz error. Measurements made by receiver manufacturers and the Commission confirm these results. A demonstration of receivers utilizing this tuner shows that it produces a very satisfactory monochrome picture on all 70 UHF channels without fine tuning and that, with AFC, it produces a very satisfactory color picture on all channels.

5. The tuning equipment in question represents a substantial advance in UHF tuning accuracy, and does so in a way which should be fully acceptable to the receiver manufacturing industry; and we think its use should be accommodated. Though this equipment does not produce tuning accuracy which is mathematically equal to VHF tuning accuracy, it does produce essentially equal subjective results. This being the case, no purpose is served by adhering to the principal of abstract equality which would require a more stringent (and currently unobtainable) tuning accuracy standard for UHF or an artificial and essentially meaningless degradation of UHF tuning accuracy.

6. The proposed rule is set out in the attached Appendix. Authority for adoption of this rule is contained in Sections 4(i), 303(r) and (s), and 330 of the Communications Act of 1934, as amended, 47 U.S.C. 154 (i), 303(r) and (s), and 330.

7. Pursuant to procedures set out in § 1.415 of the Rules and Regulations, 47 CFR 1.415, interested persons may file comments on the proposed rule on or before June 1, 1973, and reply comments on or before June 15, 1973. In addition to comment on the proposed rule, comment is requested on the prospect for full compliance with the 1975 requirement. We are interested, for example, in whether an adequate supply of tuning hardware required for compliance with that requirement will be available at a reasonable price from multiple sources. We are also interested in experimental work or new ideas which may contribute to equal and superior tuning accuracy. Comments and reply comments are available for inspection in the Commission's Broadcast and Docket Reference Room at its headquarters in Washington, D.C. All relevant and timely comments and reply comments will be considered by the Commission prior to final action in this proceeding. In reaching its decision, the Commission may take into account other relevant information before it in addition to the specific comments in-

[1] The television receiver manufacturing industry considers the requirement of AFC in monochrome receivers to be onerous and disruptive and has reservations concerning its usefulness. The Commission has stated that it would look with favor on alternatives which would be more acceptable to the industry. Memorandum Opinion and Order in Docket No. 19268, adopted September 7, 1972, FCC 72-795, 37 F.R. 19372, September 20, 1972, at paras. 3-5, 7 and 8.

vited by this Notice. In accordance with the provisions of § 1.419 of the Rules and Regulations, 47 CFR 1.419, an original and 14 copies of all comments, reply comments and other material shall be furnished the Commission.[2]

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

In Part 15 of Chapter I of Title 47 of the Code of Federal Regulations, § 15.68 (d) (3) is revised to read as follows:

§ 15.68 *All-channel television broadcast reception: receivers manufactured on or after July 1, 1971.*

* * * * * * * * *

(d) * * *

(3) On or after July 1, 1975, a 70-position non-memory UHF detent tuning system may be used to meet the requirements of this section, providing either of the following two conditions is met:

(i) *For monochrome and color receivers.*—The need for routine fine tuning UHF and VHF channels is eliminated.

(ii) *For monochrome receivers only.*—The UHF channel selection controls position the tuner within ±1 MHz of correct frequency (as measured by maximum deviation from correct frequency in kilohertz, when approached from either direction of rotation); and UHF and VHF fine tuning speed are the same (as measured in kilohertz per degree of rotation).

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[2] Shortly before the Commission completed its consideration of this matter, a petition for rule making going in the same direction as the proposed rules was filed by EIA. This notice should not be viewed as disposing of the EIA petition or as determining any matter proposed therein. The petition will be entered in the Docket file and considered as a comment in this proceeding.

F.C.C. 73-380

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CONNELLSVILLE BROADCASTERS, INC., CONNELLSVILLE, PA. For Renewal of License for Radio Station WCVI	Docket No. 19668 File No. BR-1550

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

(Adopted April 11, 1973; Released April 17, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has under consideration: (a) its Order, FCC 73-25, released January 9, 1973, designating this proceeding for hearing; (b) a petition for modification of designation order filed February 6, 1973, by Connellsville Broadcasters, Incorporated (Connellsville); and (c) comments filed February 20, 1973 by the Chief, Broadcast Bureau.

2. In the Order referred to above, the captioned renewal application was designated for hearing on various issues, including an issue to determine whether the licensee of WCVI failed to make the necessary sponsor identification announcements in connection with political broadcasts as required by Section 317 of the Communications Act and Section 73.120 of the Commission's Rules. In its petition now before us, Connellsville points out that a Bill of Particulars was served upon it by the Chief, Broadcast Bureau on January 29, 1973; that according to the Bill of Particulars some of the alleged violations of the Rules and Act of which it has been charged occurred within a one year period preceding the release of the designation Order in this case [1]; and that, consequently, such violations may give rise to the assessment of a monetary forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended. In view of the foregoing, Connellsville thus requests a modification of the designation Order in this proceeding to include a Notice of Apparent Liability for any alleged violation for which a monetary forfeiture may be assessed.

3. In prior cases similar to this proceeding, we have included appropriate forfeiture Notices and, accordingly, believe that such a procedure should be followed here.[2] The inclusion of such Notice is not to be

[1] Connellsville states that it is alleged, among other things, in paragraph 9 of the Bill of Particulars that the required sponsorship identification was not included in certain political announcements (Sinchak for State Committeeman) which were broadcast over station WCVI during the period from April 19 through April 24, 1972.

[2] *Cosmopolitan Broadcasting Corporation*, FCC 72-1137, released December 19, 1972; *Star Stations of Indiana, Inc.*, 28 FCC 2d 691 (1971); *Transamerica Broadcasting Corp.*, 24 FCC 2d 824 (1970); and *Cathryn C. Murphy*, 24 FCC 2d 216 (1970).

taken as indicating in any way what the initial or final disposition of this case should be. That judgment will be made on the particular facts of this case after a full evidentiary inquiry.

4. Accordingly, IT IS ORDERED, That the petition for modification of designation order filed February 6, 1973, by Connellsville Broadcasters, Incorporated IS GRANTED to the extent that the designation order is amended to include a Notice of Apparent Liability for monetary forefeiture for violations occurring within one year of the issuance this amendment.

5. IT IS FURTHER ORDERED, That the Order designating this proceeding for hearing, FCC 73–25, released January 9, 1973, IS REVISED to include the following:

11. IT IS FURTHER ORDERED, That if it is determined that the hearing record does not warrant an order denying the application of Connellsville Broadcasters, Incorporated for renewal of license for Station WCVI, Connellsville, Pennsylvania, it shall also be determined, whether in the light of evidence adduced pursuant to Issue No. 3 in this proceeding concerning political announcements made over Station WCVI during the period April 19–24, 1972, Connellsville Broadcasters, Incorporated should be assessed a forfeiture in the amount of $10,000 or some lesser sum pursuant to Section 503(b) of the Communications Act of 1934, as amended.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested, to Connellsville Broadcasters, Incorporated, licensee of Station WCVI, Connellsville, Pennyslvania.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-436

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re the Applications of FWS RADIO, INC.	File No. 2201-C2-P-69
PAGE A FONE CORP.	File No. 3399-C2-P-69
MORRISON RADIO RELAY CORP.	File No. 3039-C2-P-69
GENERAL TELEPHONE CO. OF THE SOUTHWEST For Construction Permits To Establish New Facilities in the Domestic Public Land Mobile Radio Service in the Dallas-Fort Worth, Tex., Area	File Nos. 4572/4578-C2-P-69

MEMORANDUM OPINION AND ORDER

(Adopted April 25, 1973; Released April 30, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONERS REID AND WILEY ABSENT.

1. The Commission has before it for consideration the above-captioned applications of FWS Radio, Inc. (FWS) for the frequency 152.24 MHz, Morrison Radio Relay Corp. (Morrison), frequency 158.70 MHz, Page A Fone Corp. (Page A Fone), frequency 158.70 MHz and General Telephone Co. of the Southwest (General), frequency 158.10 MHz, at two locations, all for new one-way paging stations to serve the Dallas-Fort Worth area. Two of these applications are mutually exclusive by reason of harmful co-channel interference (Morrison and Page A Fone), but by amendments dated December 14, and 21, 1972, these applicants agreed to share the frequency 158.70 MHz, and so there is no obstacle to granting the applications. We intend to do so, but for reasons given below, we think this is a proper situation for reexamining our "headstart doctrine".

2. General originally filed its applications for the frequency 43.22 MHz, in March of 1968. Thereafter, in October, 1968, the applications were amended to substitute the frequency 158.10 MHz, following the Commission's Report and Order in Docket 16778[1] which allocated previously unassigned spectrum to the Domestic Public Land Mobile Radio Service (DPLMRS), and reserved the frequencies 158.10 and 152.84 MHz for paging by wireline telephone companies. These are the so-called "guard-band" frequencies, together with the frequencies

[1] 12 FCC 2d 841 (1968); reconsideration denied 14 FCC 2d 269 (1968), Aff'd sub nom. *Radio Relay Corporation* v. *FCC* 409 F. 2d 322 (2d Cir. 1969).

152.24 and 158.70 MHz, reserved for non-wireline carriers. Petitions to deny General's applications were filed by Morrison and Airsignal International. Both of these petitioners, in January, 1972, requested that petitions be dismissed, and we do not believe that the issues they raised need to be considered further.

3. From January of 1972, when the petitioners requested dismissal of their petitions, until December, 1972, General's applications were not granted because of the pendency of the Morrison and Page A Fone applications mentioned in paragraph one, and the application of the Commission's "headstart" doctrine. This doctrine was set out in *Mobile Radio Communications, Inc.*, 29 FCC 2d 62 (1971) at page 64:

> . . . [I]t has been a general Commission policy not to grant one Guard Band application in a given service area without simultaneously disposing of all other applications to provide the same type of service in that area, whether those applications are from wireline or nonwireline carriers. The reason for this policy is to prevent one applicant from receiving an advantage because of the inherent delay occasioned by the requirement for a hearing on the applications of competitors.

In line with this doctrine, action was delayed on General's applications since the applications of Morrison and Page A Fone were mutually exclusive and not in a position to be disposed of simultaneously. The FWS application was also delayed for the same reason.

4. On April 10, 1972, General filed a Petition for Prompt Grant of Construction Permits. In support of the petition, General pointed to the statement of the Court of Appeals in *Radio Relay Corporation* v. *FCC*, note 1, *supra*, at 328;

> . . . If the nonwireline carriers seeking a license to use higher frequencies are already operating in the market on the lower bands, then the "headstart" problem evaporates, and there is no substantial reason for not permitting the wireline carrier to begin operating promptly.

General then mentions a similar statement by the Commission, in *Morrison Radio Relay*, 31 FCC 2d 612, 615 (1971), where the Commission stated that the "headstart" rule need not be applied where the carriers concerned are already offering a paging service. General goes on to argue that, in substance, all the nonwireline applicants in the Dallas-Fort Worth area are already offering paging service, while General is precluded from the market by the "headstart" rule. It points out that Morrison is licensed for low-band paging (Station KKJ460; 35.22 MHz) and Page A Fone is offering paging on a secondary basis (station KKH410 152.06 MHz). FWS, on the other hand, was formed by the principals' of three existing nonwireline carriers in the Dallas-Fort Worth area, namely, Pearl Forester (Forester Radio Telephone Service), George A. Smith, Jr. (Central Radio Dispatch, Inc.), and Cecil A. White, Jr. (Radio Mobile Phones

Inc.).[2] Each of these carriers offers paging on a secondary basis on two-way facilities. From this, General concludes that its applications are being held up by a "headstart" problem which, in the term used by the Court of Appeals, has "evaporated". As regards the Commission's elaboration in *Mobile Radio*, *supra*, General thinks the Commission is imposing an "unnecessarily rigid and drastic" rule, which the Appeals Court refused to impose.[3] General also argues that enforcing this policy defeats the reason for having it, since a "headstart" is obtained, but by the nonwireline carriers. From all the above, General concluded that its applications should be granted.

5. No oppositions to General's petition were filed with the Commission, presumably because the mutually exclusive carriers had agreed in principle to share the frequency they had applied for. However that may be, we are faced with the question of whether, or to what extent, the "headstart doctrine" is to have continuing validity. In deciding the question, we take into account the fact that the nonwireline industry has known of and relied on this doctrine. We cannot doubt that they have omitted filing Petitions to Deny wireline applications because they thought it was unnecessary, under this doctrine. However, we must also take into account the fact that many qualified, wireline applicants are being prevented from offering service by a Commission policy which attempts to "protect" licensees who are already in the market. Where conflicting interests collide, the Commission must, to the best of its ability, find where the public interest lies. Here, we think the Commission's policy is depriving the public of the benefits of the choice between carriers which, at least in part, prompted our decision to allocate separate frequencies for wireline and non-wireline carriers in Docket 16,778, *supra*. Moreover, at a time of increasing frequency scarcity, frequencies allocated four years ago are still not being utilized. Thus, our policy does not benefit the public and wastes spectrum. Balancing these considerations, we believe that it is preferable to relax the headstart doctrine as set out in *Mobile Radio*, and follow the position taken by the Court of Appeals in the *Radio Relay* case, i.e., that the headstart danger evaporates when the nonwireline carriers are already offering a paging service. In addition, we think that we should apply the same standard where only nonwireline carriers are involved. As a result, FWS and other applicants in the same position as FWS in this case will be entitled to a grant (if otherwise in order) if they are being delayed by pending applications from persons already offering paging.

6. It should be noted that here all the nonwireline applicants or their principals, are offering paging. This may not be the case elsewhere, and we do not wish to set out in detail what position we will take when one or more of several nonwireline applicants are not offering paging. Such cases will require a balancing of interests, and we

[2] This was the situation when the FWS application was filed. However, on November 19, 1970, the application was amended, deleting Mr. White as a shareholder. The stock he formerly held is now owned by Gene H. Forester (16⅔%), George A. Smith III (8⅓%) and James H. Smith (8⅓%). This amendment does not seem to alter the substance of General's argument.

[3] 409 FCC 2d at p. 328.

do not wish to set out an inflexible standard. For the present it is enough to say that the headstart doctrine should be and is revised to the extent indicated herein.

7. Our review of the applications shows that each applicant is legally, technically, financially and otherwise qualified to render the services proposed.

8. Accordingly, IT IS ORDERED that the applications of Page A Fone Corp. (File No. 3399–C2–P–69) and Morrison Radio Relay Corp. (File No. 3039–C2–P–69), ARE GRANTED in accordance with a co-operative sharing agreement as specified in the authorizations, and the applications of FWS Radio Inc., (File No. 2201–C2–P–69) and General Telephone Co. of the Southwest (File Nos. 4572/4578–C2–P–69), for construction permits to establish new facilities in the Domestic Public Land Mobile Radio Service in the Dallas-Fort Worth, Texas area, ARE GRANTED.

9. IT IS FURTHER ORDERED, that the construction permits of General Telephone Co. are conditioned in that "The grantee shall offer to make available to the non-wireline common carrier for one-way signaling purposes the same dial access interconnection facilities as those utilized by the wireline common carriers in the community; further that the charges for such interconnection and all other facilities of the wireline company used by the non-wireline carriers in the one-way signaling service on frequencies 152.24 and 158.70 MHz, shall be identical with those costs used by the wireline company on frequencies 152.84 and 158.10 MHz in computing its own charges over the same distances when it offers a competitive service, or where distances are different, the same per mile basis; and finally, if a wireline carrier offers or purports to offer any free or reduced rate service in connection with its one-way signaling service, it shall provide the identical service so offered or purported to be offered to customers of any competing non-wireline carrier at the same reduced rate or free of charge."

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-158

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
ERWIN GLADDENBEGK, SHELL LAKE, WIS.	Docket No. 19211 File No. BPH-7192
CHARLES R. LUTZ, SHELL LAKE, WIS.	Docket No. 19212
For Construction Permits	File No. BPH-7262

MEMORANDUM OPINION AND ORDER

(Adopted April 16, 1973; Released April 18, 1973)

BY THE REVIEW BOARD: NELSON, PINCOCK AND KESSLER.

1. The Review Board has before it a petition for reconsideration of its Decision FCC 73R-74, released February 14, 1973, filed by Charles R. Lutz. The petitioner has advanced no facts or arguments not fully considered by the Review Board in the subject decision. The questions raised by Lutz concerning the Board's disposition of his petition to amend his application were not raised, either by exception or at the oral argument and are thus grossly untimely. Moreover, the Board's Memorandum Opinion and Order, FCC 72-347, released November 29, 1972, 38 FCC 2d 448, 25 RR 2d 1070 fully treats that petition to amend and petitioner has raised no new matters in his instant petition for reconsideration. Lutz's petition for reconsideration will therefore be denied. *Daily Telegraph Printing Company*, 37 FCC 2d 428, 25 RR 2d 473 (1972).

2. Accordingly, IT IS ORDERED, That the petition for reconsideration, filed March 16, 1973, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-163

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of HARVEST RADIO CORP., FERGUS FALLS, MINN. For Construction Permit	Docket No. 18852 File No. BP-17918

MEMORANDUM OPINION AND ORDER

(Adopted April 20, 1973; Released April 26, 1973)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. The above-captioned application for a new standard broadcast station in Fergus Falls, Minnesota, was denied by the Initial Decision of the Administrative Law Judge, Isadore A. Honig, released November 1, 1972. (FCC 72D-70.) The applicant in that proceeding filed what purported to be exceptions to the Initial Decision on December 8, 1972. The document was signed by Lowell S. Levine, Secretary-Treasurer. Replies were filed by the Broadcast Bureau on December 20, 1972, and by Empire Broadcasting Corporation, Inc. (Empire), a party respondent, on December 29, 1972. On December 27, 1972, the Bureau filed a motion to strike the exceptions, alleging that counsel of record for Harvest had informed the Chief of the Hearing Division by telephone that the corporation's board of directors had decided to file no exceptions. Copies of the Bureau's motion to strike were mailed to Harvest's counsel of record and to the Secretary-Treasurer at his address of record. No response to that motion was received. The Board thereupon adopted a Memorandum Opinion and Order, FCC 73R-49, striking the exceptions because they were not authorized by the applicant. The Board further noted that even if the exceptions were to be treated by the Board, they must of necessity be rejected because they failed to comply with the requirements of Section 1.277(a) of the Commission's Rules [1] and because they were filed late and no good cause for the tardiness was shown.

2. The Review Board now has before it what purports to be a petition to reconsider its Memorandum Opinion and Order dismissing Harvest's exceptions.[2] The petition for reconsideration must be denied. Section 1.21(d) of the Commission's Rules and Regulations provides:

> (d) Except as otherwise expressly provided in this chapter, a duly authorized corporate officer or employee may act for the corporation in any matter which has not been designated for an evidentiary hearing and in the discretion of the presiding officer, may appear and be heard on behalf of the corporation in an evidentiary hearing proceeding.

[1] In addition to being improperly filed, the "exceptions" are argumentative, fail to point out with particularity alleged errors in the decision, and fail to contain specific references to the transcript page or exhibit upon which the exception is based.

[2] Also before the Board are oppositions, filed by Empire and the Broadcast Bureau, on March 14, 1973, and March 20, 1973, respectively.

109-037—73——3

Harvest has failed to establish that Lowell S. Levine, its Secretary-Treasurer, is authorized to act on behalf of the corporation. The memorandum, dated February 18, 1973, signed by Gerald F. Bates, President of Harvest Radio Corporation which states that Levine is authorized to act for the corporation is not sufficient. At no point does this memorandum state that it reflects an official action of the Board of Directors of Harvest Radio Corporation or of its corporate shareholders. In the absence of a properly documented statement of corporate intent, pleadings filed over the signature of officers or employees of those corporations cannot be accepted by the "Presiding Officer" in Commission hearing proceedings. Moreover, the Board reiterates that the purported exceptions filed by Harvest do not comply with the requirements of Section 1.277(a) of the Commission's Rules, and the instant petition does not cure these deficiencies.

3. Accordingly, IT IS ORDERED, That the petition for reconsideration, filed by Harvest Radio Corporation on March 5, 1973, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-429

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of INTERNATIONAL RECORD CARRIER'S SCOPE OF OPERATIONS IN THE CONTINENTAL UNITED STATES, INCLUDING POSSIBLE REVISIONS TO THE FORMULA PRESCRIBED UNDER SECTION 222 OF THE COMMUNICATIONS ACT	Docket No. 19660 RM-690

ORDER

(Adopted April 18, 1973; Released April 23, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT; COMMISSIONER REID DISSENTING TO THE BUREAU DELEGATION CONTAINED IN THE LAST PARAGRAPH.

1. The Commission has before it a petition filed under Section 1.223(b) of the Commission's rules and regulations by the United States Department of Defense (DOD) for leave to intervene in Docket No. 19660, a general inquiry instituted to consider a number of related issues concerning the domestic handling of international record communications traffic. *See* 38 F.C.C. 2d 543 (1972). The petition, which has been served on all parties to this proceeding, has not been opposed. We note that as one of the largest users of communications services in the world, DOD is an uniquely interested party and one whose interests cannot be adequately represented by any other party. We believe that DOD's participation will be of assistance to us in effectively resolving the issues under consideration herein. Therefore, we have concluded that good cause has been shown to grant DOD's petition to become a party in this proceeding.

2. Section 1.223(b) states that the "presiding officer" is to decide whether or not to grant petitions for leave to intervene. In a hearing proceeding this would normally be a function of an administrative law judge, but since no hearings have been specifically ordered as yet in Docket No. 19660, no such judge has been appointed. We have already directed the Chief, Common Carrier to preside over informal meetings in this proceeding. Therefore, we conclude that for the purpose of these meetings and other nonhearing procedures to be followed in this matter, it will be appropriate to grant the Chief, Common Carrier the authority to consider petitions for leave to intervene and nonparty requests for participation under Section 1.225 until such time as specific issues are designated and an administrative law judge is appointed. In this way, we can bring the procedural structure of the rule into harmony with the particular course of procedure adopted in this

docket. For the same reason, we believe it appropriate to waive provisions of Section 1.223 insofar as they are premised on procedures different from those adopted herein.

Accordingly, IT IS ORDERED, That the petition of the Secretary of Defense for leave for the United States Department of Defense to intervene in the inquiry in Docket No. 19660 is GRANTED, and the Department of Defense is made a party respondent.

IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau is given authority consistent with this order to act upon petitions which may be filed in Docket No. 19660 by interested persons for leave under Section 1.223(b) of the Commission's rules and regulations to intervene as parties, and upon requests under Section 1.225 of those rules for participation as non-parties, until such time as specific issues are set for hearing and an administrative law judge has been appointed to preside over such hearings.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–400

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AN INQUIRY RELATIVE TO THE FUTURE USE OF THE FREQUENCY BAND 806–960 MHz; AND AMENDMENT OF PARTS 2, 18, 21, 73, 74, 89, 91, AND 93 OF THE RULES RELATIVE TO OPERATIONS IN THE LAND MOBILE SERVICE BETWEEN 806 AND 960 MHz.	Docket No. 18262

ORDER ESTABLISHING SCHEDULE FOR ORAL PRESENTATION

(Adopted April 11, 1973; Released April 13, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT.

1. The Commission, on March 13, 1973, adopted an Order for Oral Presentation in the above-mentioned proceeding.[1] The Order set a period for interested parties to file written notices of intention to appear and participate, and scheduled the oral presentations for May 7 and 8, 1973. Since then, the date for filing such notices was extended from March 22 to March 29, 1973.[2] In addition, it was necessary to reschedule the dates for the oral presentations to May 14 and 15, 1973.[3]

2. Nearly 100 notices of intention to appear and participate in the oral presentations were received. A complete list appears in Appendix A.

3. The overwhelming response has created a time allotment problem for the oral presentations. The specific times requested and comparable times to parties not specifying times total considerably more than the two days available. Thus, to obtain maximum advantage of the time available, the Commission has adopted a schedule that will provide ample opportunity to express the diverse views on the various issues, while, at the same time, maintaining a balance between the various interests.

4. The schedule was developed by arranging the parties in four basic groups: common carriers and their representatives; land mobile equipment manufacturers; private land mobile user representatives; and other interests. Individual parties within each major group were allotted time according to past participation in this proceeding. Parties representing the broadest views were scheduled to appear on the first day. Parties representing more specific interests were scheduled the

[1] Order, Docket 18262, released March 15, 1973 (FCC 73–284).
[2] Order, Docket 18262, released March 22, 1973.
[3] Order, Docket 18262, released April 14, 1973.

second day. Other than keeping parties representing similar interests together, the order of appearance on the second day was at random.

5. We have received notices of appearance from a large group of private radio station licensees, and although it would be desirable to hear their views, it is not practical. To attempt to schedule all parties in the available time would not serve either the Commission's purposes or the purposes of the parties involved. Some thought was given to scheduling elected spokesmen to express representative views of the remaining parties. However, the Commission feels that it would be impossible for such a diverse group to organize themselves in such a short period. It appears, however, that the views of these licensees would be expressed by the various user associations. The Commission is encouraging all parties not afforded the opportunity to participate in the oral presentations to make their views known to scheduled parties which most closely represent their position. In addition, in the interest of complete fairness, the record will remain open until May 25, 1973, in order to permit filing of written comments by parties not afforded time and who feel that their views have not been sufficiently expressed at the oral presentations.

6. Notices have been filed by several hospital and taxicab licensees, and by small business enterprises engaged in the sale, installation, and servicing of land mobile radio systems, and it does not appear that these groups are represented by any of the scheduled parties. Accordingly, we have allotted a period of time to each of these three groups, and we urge them to select one of their number as a spokesman to make the presentations. The name of each spokesman is to be submitted to the Commission at least by May 4, 1973.

7. We have also allotted time for rebuttals. This time has been divided as indicated in the Schedule. We expect that a single spokesman for each group would be selected to make the rebuttal presentation. The names of these spokesmen should also be submitted by May 4, 1973. To conclude the rebuttals and the Oral Presentation we have scheduled an additional five minutes each to the American Telephone and Telegraph Company and Motorola Incorporated who have been the major participants in this proceeding to make their final comments.

8. Accordingly, IT IS ORDERED, That the presentations shall be made before the Commission, *en banc*, commencing at 9:30 a.m. on May 14, 1973, and concluding on May 15, 1973; and That the parties shall appear and make their presentations in accordance with the Schedule for Oral Presentation set forth in the attached Appendix B; and That the record of the Oral Presentation shall remain open until May 25, 1973, following the presentations to permit filing of written comments by parties requesting appearance but not scheduled.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX A

PARTIES WHO FILED REQUESTS TO PARTICIPATE IN ORAL PRESENTATION

Aeronautical Radio, Inc.
Airsignal International, Inc.
Airz-Son Co.
Albany Protective Service
American Beef Packers, Inc.
American Transit Association
American Telephone & Telegraph Co.
Associated Public-Safety Communications Officers, Inc.
Association of Maximum Service Telecasters (for itself and on behalf of National Association of Broadcasters and the National Association of Educational Broadcasters)
Atlanta Cap Co., Inc.
Atlanta Car-For Hire Association
Atlanta Transportation Association Cooperative
Bell & Harden
Blue Ribbon Vending Co.
Boston Cab Co.
B. R. DeWitt, Inc.
Central Committee on Communication Facilities of the American Petroleum Institute
Chicago Communication Service, Inc.
Chicago Transit Authority
C.M.H., Inc.
Columbia Mall, Inc.
Colonial Sand and Stone Co., Inc.
Communications, Inc.
Condit, Paul
Consulting Communications Engineers, Inc.
County Ambulance Service
Courtney, Jeremiah
Crow Pipe and Land Co.
Dallas Transit System
Duncan Realty Co.
Ed Gehm Engineering and Refrigeration Co.
Edw. C. Levy Co.
Fillmore Taxi Co.
First National Bank in Dallas
Fort Lauderdale Police Department
Gainesville Industrial Electric
George J. Igel and Company, Inc.
General Electric Co. (Major Appliance Business Group)
General Electric Co. (Mobile Radio Department)
GTE Service Corp.
Henry Ford Hospital
Homes By Byron, Inc.
Integrated Systems Technology, Inc.
International Association of Chiefs of Police
International Bridge, Tunnel, and Turnpike Association
International Municipal Signal Association
John Cardi Construction Co.
Kent State University
Land Mobile Communications Section, Communications and Industrial Electronics Division, Electronic Industries Association
Leonard Amusement Co.
L. E. Myers Co.
Martin Marietta Corp.
Mar Van Equipment
Material Service Corp.
Medeiros, John
Michigan State University
Minor, James Larry
Motorola, Inc.
Mueller Electronics
Mulbarger Twins, Inc.
Nardei Contracting Co. Inc.
Nash Lawn Service
National Association of Business and Educational Radio, Inc.
National Association of Radiotelephone Systems
New Jersey Hospital Association
New York City Transit Authority
Northside Sales Co.
Northwestern Elevator Co., Inc.
Radio Broadcasting Co.
Ram Broadcasting Corp.
RCA Corp.
Ricks Delivery Service
Ross Equipment Co.
Scott Communications Co.
Simpson Engineering Service, Inc.
Southeast Ohio Emergency Medical Service
Special Industrial Radio Service Association, Inc.
Standard Oil Co. of Ohio
St. Louis Electronics
Stanley, H. L.
Stewart Brothers, Inc.
Terminal Taxi Co.
Texas Industries, Inc.
Texas Instruments, Inc.
The Magnavox Co.
Transit Mixed Concrete
United States Independent Telephone Association
United Telecommunications, Inc.
University of Michigan
Utilities Telecommunications Council
Wellsback Electric Co.
William Taylor Construction, Inc.
Yale Industrial Trucks of New York
Yellow Cab Co.
6 Flags Over Georgia, Ltd.

APPENDIX B

SCHEDULE FOR ORAL PRESENTATION

Monday, May 14, 1973

Party name:	*Allotted time (minutes)*
American Telephone & Telegraph Co	60
United States Independent Telephone Association	10
United Telecommunications, Inc.	10
GTE Service Corp	10
Integrated Systems, Inc	10
National Association of Radiotelephone Systems	35
RAM Broadcasting Corp	5
Radio Broadcasting Co	5
Airsignal International, Inc	5
Chicago Communications Service	5
Jeremiah Courtney	5
Electronic Industries Association, Land Mobile Comm. Section	20
Motorola, Inc	60
General Electric (Mobile Radio Dept.)	30
Martin Marietta	20
Magnavox Co	5
RCA Corp	5

Tuesday, May 15, 1973

General Electric Co. (Major Appliance Business Group)	20
Association of Maximum Service Telecasters (for itself, and for the National Association of Broadcasters and the National Association of Educational Broadcasters)	15
National Assoc. of Business and Educational Radio, Inc	20
Associated Public-Safety Communications Officers, Inc	20
Special Industrial Radio Service Association, Inc	20
Utilities Telecommunications Council	10
Central Com. on Communication Fac. of American Petroleum Inst	10
International Municipal Signal Association	10
International Bridge, Tunnel and Turnpike Association	10
American Transit Association	10
Spokesman for: Henry Ford Hospital, New Jersey Hospital Association, Southeast Ohio Emergency Medical Service	5
Spokesman for: Atlanta Transportation Association, Boston Cab Co., Terminal Taxi Co., Yellow Cab Co. of Greater Buffalo, Inc	5
Spokesman for: Communications, Inc., Gainesville Industrial Electric Co., Lake Side Communications, Mueller Electronics, Scott Communications Co., St. Louis Electronics	5
Aeronautical Radio, Inc	10
Rebuttals	
Spokesmen for:	
Wireline common carriers	15
Radio common carriers	15
Land mobile equipment manufacturers	15
Private radio user associations	15
Motorola, Inc	5
American Telephone and Telegraph Co	5

F.C.C. 73–412

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re LEACOM, INC., BUENA VISTA, COLO. For Certificate of Compliance	CAC–1421 CO–059

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1973; Released April 26, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT.

1. On March 13, 1973, the Commission denied the above-captioned application for certificate of compliance because the term of the franchise awarded the applicant was unreasonably long. The initial duration of the franchise was fifteen years, with an unqualified option to renew for another five years. We determined that this provision of the franchise contravened Section 76.31(a)(3) of the Rules. *Leacom, Inc.*, FCC 73–292, —— FCC 2d ——.

2. Following our decision, the Board of Trustees of the Town of Buena Vista, Colorado, amended the franchise to strike that provision giving the franchisee an automatic option to renew. As a consequence, the franchise, as amended, is valid for fifteen years. With this amendment, the sole objection to the franchise and the application for certificate of compliance has been removed.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Reconsideration filed April 3, 1973, IS GRANTED.

IT IS FURTHER ORDERED, That the application for certificate of compliance (CAC–1421) filed by Leacom, Inc., IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R–166

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
LEXINGTON COUNTY BROADCASTERS, INC., CAYCE, S.C.	Docket No. 19568 File No. BPH–7605
WILLIAM D. HUNT, CAYCE, S.C.	Docket No. 19569
For Construction Permits	File No. BPH–7658

MEMORANDUM OPINION AND ORDER

(Adopted April 23, 1973; Released April 27, 1973)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The above-captioned applications for a new FM broadcast station on Channel 244A at Cayce, South Carolina, were designated for hearing on a standard comparative issue by Order, 37 FR 16820, published August 19, 1972.[1] Now before the Review Board is a petition to enlarge issues, filed September 5, 1972, by Lexington County Broadcasters, Inc. (Lexington County), requesting the addition of Rule 1.65, misrepresentation, *Suburban*, Suburban Community, staffing, financial, and site availability issues against William D. Hunt (Hunt).[2]

SUPPLEMENTAL PLEADINGS

2. Before proceeding to the merits of Lexington County's petition, we will first consider the numerous supplemental pleadings filed in connection with the petition. See note 2, *supra*. The filing of these pleadings was precipitated by new matters raised by Lexington County in its October 12, 1972 reply pleading. Sections 1.45 and 1.294 of the Commission's Rules clearly state that replies "shall be limited to matters raised in the oppositions." Therefore, to the extent that Lexington County's reply pleading contains wholly new and previously unmentioned allegations of fact, the reply pleading will be dismissed. See *Industrial Business Corporation*, FCC 73R–109, —— FCC 2d ——, released March 13, 1973. Hunt, in response to the new matters

[1] At present, there is only one broadcast facility in Cayce, WCAY–AM, which is licensed to Lexington County Broadcasters, Inc. Channel 244A was assigned to Cayce in 1971. See Report and Order in Docket No. 19144, 30 FCC 2d 180, 22 RR 2d 1661.

[2] Other related pleadings before the Review Board are: (a) opposition, filed September 20, 1972, by Hunt; (b) erratum, filed September 21, 1972, by Hunt; (c) Broadcast Bureau's comments, filed September 29, 1972; (d) reply, filed October 12, 1972, by Lexington County; (e) special showings, filed November 20, 1972, by Hunt; (f) further special showing, filed December 4, 1972, by Hunt; (g) erratum to (f), filed December 12, 1972, by Hunt; (h) petition to accept pleading, filed December 27, 1972, by Lexington County; (i) supplement, filed December 27, 1972, by Lexington County; (j) opposition to petition to accept pleading and reply to supplement, filed January 8, 1973, by Hunt; (k) reply to (j), filed January 17, 1973, by Lexington County; (l) petition to accept addendum, filed January 20, 1973, by Lexington County; (m) addendum, filed January 20, 1973, by Lexington County; (n) motion to dismiss, filed February 27, 1973, by Hunt; (o) reply to (n), filed March 9, 1973, by Lexington County; and (p) reply to (o), filed March 12, 1973, by Hunt.

raised by Lexington County's reply pleading, submitted a special showing and a further special showing. As a consequence, Lexington County filed a supplement to its reply, which comes nearly two and one-half months after the reply was filed. Raising still new matters, Lexington County, on January 20, 1973, filed an addendum to its initial September 5, 1972 petition to enlarge. Then, Hunt filed a motion to dismiss the addendum and Lexington County filed an opposition to Hunt's motion. The last pleading the Board received in this matter was entitled "Reply to Opposition ("Reply") to Motion to Dismiss", filed March 12, 1973. In our *Public Notice on The Filing of Supplemental Pleadings Before the Review Board*, No. 90836, released October 11, 1972, we stated that we would closely scrutinize all the alleged justifications for the filing of supplemental pleadings because the filing of such pleadings inordinately delays the adjudicatory processes. We believe the filing of the special showings by Hunt and the filing of a supplement and an addendum by Lexington County are wholly without justification. As the Court stated in *Valley Telecasting Co., Inc.*, v. *FCC*, 119 U.S. App. D.C. 169, 338 F. 2d 278, RR 2d (1964), with respect to late filed pleadings before the Commission, it "cripples any decision making process and handicaps the agency in carrying out its functions." Therefore, the Board will dismiss Hunt's special showings; deny Lexington County's petition to accept pleading and supplement; grant Hunt's motion to dismiss; and deny Lexington County's petition to accept addendum.

RULE 1.65 ISSUE

3. In its petition, Lexington County first requests a Rule 1.65 issue against Hunt for allegedly failing to report the effect of the purchase of stock in the broadcast company by Agnes Hunt, Hunt's wife, on Hunt's financial position as reported in his application and for allegedly failing to fully report the broadcast interests of his wife. According to petitioner, Hunt, in a post designation amendment filed August 17, 1972, revealed that his wife has acquired a 20% stock interest and has been elected secretary-treasurer of Forjay Broadcasting Corporation (Forjay), proposed assignee of Station WYNN, Florence, South Carolina. Mrs. Hunt's interest in Forjay amounts to $4,000; however, petitioner submits, Hunt's joint balance sheet, which reflects his and his wife's financial positions and which was filed prior to the amendment, reveals that the Hunts have only $5,000 in "quick assets". Lexington County argues that Hunt should have amended the financial section of its application to reflect the $4,000 expenditure by Mrs. Hunt. Furthermore, Lexington County contends that the Hunts' August 17th amendment failed to mention: (a) that Mrs. Hunt is one of three directors of Forjay; (b) that she is a director and has stock interests in WYNN, Inc., present licensee of station WYNN; (c) that she is a director of WOIC, Inc., licensee of station WOIC, Columbia, South Carolina; (d) that she is a director of station WTMP, Tampa, Florida; and (e) that she is a director of WPAL, Inc., licensee of station WPAL, Charleston, South Carolina. Lexington County also argues that these omissions reflect adversely on Hunt's

candor with the Commission and on his character qualifications, and therefore warrant the addition of appropriate issues.

4. Both Hunt and the Broadcast Bureau oppose the requested Rule 1.65 and related issues. Hunt claims that his wife's purchase of stock in Forjay was made with her separate funds. It was by mere "oversight", Hunt argues, that he failed to report his wife's positions with WOIC, WTMP and WPAL; and Mrs. Hunt's connection with WYNN terminated on April 19, 1972, and this was reported in the August 17th amendment.[3]

5. The Review Board will deny the requested issue. According to Hunt's responsive pleading, his wife used her own separate monies to purchase the Forjay stock. Lexington County has not rebutted this, and the Board perceives no reason to doubt the veracity of this allegation. With respect to Mrs. Hunt's other broadcast interests, the Board agrees with the Bureau that it does not appear that these interests could have any decisional significance in this proceeding. *Cf.* Report and Order regarding *Reporting of Changed Circumstances* 3 RR 2d 1622 (1964). Hunt indicated in response to Question 21(b), Section II (FCC Form 301)[4] that his wife had connections with other broadcast interests and submitted an exhibit listing her connections. Subsequent amendments filed February 23, August 17, August 31, and December 19, 1972, by Hunt reflect various changes in Mrs. Hunt's relationship with these interests, although Hunt did not report these interests referred to by the petitioner. While Hunt did not report these changes, the omissions are not serious, appear to be the result of inadvertance, and appear to have no decisional significance. The Board, therefore, does not believe that a Rule 1.65 issue is warranted. See *Auburn Publishing Company*, 34 FCC 2d 134, 24 RR 2d 29 (1972). Likewise, the facts before us do not warrant the addition of lack of candor or character issues. See *Folkways Broadcasting Co., Inc.*, 36 FR 3847, 21 RR 2d 211 (1971).

MISREPRESENTATION ISSUE

6. Lexington County next alleges that in his application Hunt misrepresented his efforts to ascertain community needs, interests and problems. According to Lexington County, Hunt represented in his application, that "he has personally consulted with, either by telephone or person-to-person contact, community leaders in Lexington County . . . and Richland County . . . South Carolina." Lexington County states, however, that it contacted and obtained statements from six community leaders who assert that Hunt did not interview them or did so in an abbreviated manner. Lexington County submits three unsworn statements from three persons whose names appear in Hunt's general public surveys. Both the Broadcast Bureau and Hunt oppose the request. Hunt asserts that he recontacted each of the leaders listed

[3] The amendment referred to by Hunt was accepted by the Administrative Law Judge by Order, FCC 72M–1229, released October 3, 1972.

[4] Question 21(b) states: "Does any member of the immediate family (i.e., husband, wife, father, mother, brother, sister, son or daughter) or any party to this application have any interest in or connection with any other broadcast station or pending application?"

by Lexington County and only two do not remember being interviewed.[5]

7. The Review Board will deny the requested issue. To support its request, Lexington County submitted a total of nine statements of persons allegedly interviewed by Hunt, two affidavits from Ben H. Dekle, and one affidavit from Herbert Davis, both of whom are associated with Lexington County. Section 1.229(c) of the Commission's Rules requires that a petition to enlarge issues shall contain specific allegations of fact, and that these allegations of fact, except those of which official notice may be taken, shall be supported by affidavits of a person or persons having personal knowledge of the facts. See *Eastern Broadcasting Corp.*, 29 FCC 2d 472, 21 RR 2d 1147 (1971). Only two of the nine statements submitted by petitioner are in correct affidavit form. The three affidavits from representatives of Lexington County submitted by the petitioner represent only the hearsay statements of persons who do not have knowledge of the facts alleged. The affidavits submitted by Hunt in its opposition, we believe, are also deficient. Only one of the affidavits submitted by Hunt is from a community leader he allegedly interviewed and the others are from Hunt's interviewers whose affidavit represent only hearsay statements. However, the burden is upon the petitioner to present sufficient allegations of fact to raise a substantial question warranting further exploration at hearing. See *Phil D. Jackson*, 23 RR 2d 1023, 33 FCC 2d 928 (1972). The two affidavits which are in proper affidavit form submitted by petitioner do not adequately support petitioner's request. In one affidavit the affiant responded to the question whether he had been contacted by Hunt with, "Possible. I talked to someone approximately a year ago who was interested in a FM station in this area. However, I am not certain that it was William D. Hunt." In the other, the affiant responded, "I do not know." These ambiguous statements hardly support a conclusion that the affiants had not been interviewed by Hunt; therefore, we do not believe an issue is warranted. Compare *California Stereo, Inc.*, 39 FCC 2d 401, —— RR 2d —— (1973).

SUBURBAN ISSUE

8. In support of its request for a *Suburban* issue, Lexington County alleges that Hunt's survey of community leaders and his "planning of programs to meet community needs" do not conform to the requirements of the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971). Petitioner states that Hunt's application reveals that community leaders were contacted either by "phone or person-to-person" and argues that the method used by Hunt of contacting community leaders by telephone is contrary to the *Primer's* requirement of a "person-to-person dialogue between the decision-making personnel of the

[5] With his opposition, Hunt submits affidavits from himself, his wife, and Thomas S. Nesmith, Jr., all of whom are proposed management level personnel. All three conducted the original surveys and allegedly recontacted the persons listed by Lexington County in its petition. Submitted with the affidavits are four statements from two persons appearing in Hunt's general public survey and two community leaders stating that they were contacted by Hunt.

applicant and the community leader being interviewed." Since Hunt has not explained how each leader was contacted, Lexington County argues, the efficacy of Hunt's ascertainment efforts is open to question. Finally, Lexington County contends, Hunt's application does not reflect any statement or cataloguing of the needs and problems ascertained through surveying members of the general public.

9. In the Board's judgment, a *Suburban* issue is not warranted. Careful examination of the ascertainment of community needs material Hunt submitted with his application, and the amendments thereto, reveal a prima facie showing of compliance with the intent and purpose of the policy spelled out in the *Primer* and related documents. A dialogue with community leaders and with members of the general public has been established, and the mere fact that some, or indeed, that most of the contacts with community leaders may have been by telephone rather than in face-to-face conversation does not make the showing unacceptable. Extensive community leader and general public surveys were undertaken, community problems were identified and associated with the persons who expressed them, and programs were designed to relate to these community needs. Beyond the assertion that the surveys are unacceptable because some of them were conducted by telephone, petitioner has alleged nothing to cast doubt on the surveys, and this is not enough, since telephone interviews of community leaders are not *per se* unacceptable. Conducting interviews by telephone may not be the best way of making a survey, as, for example, where the person doing the interviewing is a stranger to the city or area, and the methodology employed may, in appropriate circumstances, have a bearing on the weight to be given to an applicant's declarations concerning the results of its surveys. However, that is not the situation here; we have nothing more than a contention that Hunt's survey must be rejected because the telephone was used in conducting some of the interviews with community leaders. In the cases cited by petitioner,[6] the Commission was confronted with inquiries as to whether group encounters between the applicant and the community leader met *Primer* requirements. The Commission, in responding to these inquiries, emphasized the need for a free exchange of views between the applicant and the community leaders and, as long as the applicant could establish that his method, either in a group situation or by some other means, produced such a dialogue, it would not violate Commission requirements.

10. Petitioner also alleges that Hunt failed to catalogue the needs and problems ascertained in his surveys of members of the general public. The *Primer* requires applicants to list the community problems and needs that they have ascertained from both surveys of community leaders and surveys of the general public; however, there is no requirement that the applicant list separately the needs and problems ascertained from the general public. Although Hunt in his application set forth in problems ascertained and attributed to the community leaders who suggested it as a community problem, Hunt explains in his responsive pleading that the results from his "survey of the general public

[6] *I.e., Southern California Broadcasters Association, Inc.*, 30 FCC 2d 705, 22 RR 2d 385 (1971); *Fisher's Blend Station, Inc.*, 30 FCC 2d 37, 21 RR 2d 1220 (1971).

were virtually identical with those recited by leaders in the community." Therefore, it would appear that the list of community needs and problems submitted by Hunt were derived from both community leaders and the general public. Since petitioner has not shown to the contrary, the Board does not believe an issue is warranted.

SUBURBAN COMMUNITY ISSUE

11. To support its request for a Suburban Community issue, Lexington County asserts the following, which in its view, strongly suggests that Hunt intends to serve Columbia, South Carolina, and not the proposed community of service, Cayce: (a) Hunt is a long time resident of Columbia; (b) his initial survey of community leaders shows that more leaders were interviewed from Columbia than from Cayce; (c) Hunt's transmitter site is located so that it will provide a 3.16 mv/m signal over Columbia; (d) he is a self-employed farmer on a farm he owns in Eastover, South Carolina, which is in the eastern section of Richland County—away from Cayce;[7] (e) Hunt is employed at Fort Jackson which is located east of Columbia and away from Cayce; and (f) there is a great population disparity between Columbia, population 113,542 and Cayce, population 9,967, or ratio of 11 to 1. Both Hunt and the Broadcast Bureau oppose the request.

12. The Board will deny the requested issue. In our opinion, petitioner has not raised a substantial question as to whether Hunt intends to serve Columbia, rather than Cayce. Petitioner claims that the Commission, in its Report and Order, assigning Channel 244A to Cayce,[8] expressed a concern that the Suburban Community policy may have applicability to the Columbia-Cayce relationship. However, we believe the Commission was merely expressing an awareness that *any* FM proposal for Cayce would serve some portion of Columbia because the two communities are so close, lying across the Congaree River from one another. In fact, the Commission in footnote 9 (30 FCC 2d at 185), stated that, "The flexibility for site selection is limited." In any event, *both* applicants will place a 3.16 mv/m signal over Columbia. The remainder of petitioner's allegations, *e.g.*, Hunt's long time residence in Columbia and his employment outside Columbia, are insufficient to warrant addition of an issue.[9] Significantly, petitioner has not shown that Cayce is dependent upon Columbia for its civic, social or business activities, or that Hunt's program proposals are intended to serve the programming needs of Columbia, rather than Cayce. See *Southland, Inc.*, 37 FCC 2d 125, 25 RR 2d 186 (1972). Finally, we do not find it unreasonable that Hunt would interview a substantial number of community leaders from Columbia. The *Primer*, *supra*, 27 FCC

[7] Cayce is located in Lexington County.

[8] See note 1, *supra*.

[9] Petitioner's reliance on *Berwick Broadcasting Corporation*, 20 FCC 2d 393, 17 RR 2d 884 (1969) is misplaced. In *Berwick*, a strong signal was to be placed over the larger community and the applicant's proposed antenna site was to be located midway between the larger community and the smaller community of service. That is also the case here. However, in *Berwick* the applicant also owned an existing AM station in the larger community which was to be used in conjunction with the proposed FM station. Other than the above mentioned technical factors present in both *Berwick* and the instant case, petitioner has not alleged any facts suggesting that Hunt intends to serve Columbia and not Cayce.

2d at 658–659, 22 RR 2d at 1516, 1517, Q & A 6, states that an applicant should also ascertain the problems of the other communities that he undertakes to serve. Columbia is the largest single other community Hunt proposes to serve. Furthermore, Hunt's initial survey plus the amendment to his survey show a total of more community leaders surveyed from Cayce than Columbia.

STAFF SUFFICIENCY ISSUE

13. According to Lexington County, while Hunt has indicated in his application that he will have seven employees,[10] he has made no provision for a first class radiotelephone operator, which is required by Commission Rule 73.265 for FM stations with less than 25 kw power. Nor, petitioner continues, has Hunt provided for any administrative personnel, part-time announcer or maintenance help. Both Hunt and the Broadcast Bureau oppose the request. Hunt argues that his staff is sufficient for his proposed operation and supports his argument by submitting the affidavit of Tom Nesmith, Hunt's proposed general manager, who has "substantial broadcast experience." Hunt asserts that he will contract for the services of a "First Class Engineer" to fulfill the necessary technical requirements. Furthermore, Hunt claims that Nesmith has a third class radiotelephone operator's license and that he (Hunt) and his wife are studying to obtain their own third class licenses.

14. The Review Board does not believe a staff adequacy issue is warranted. Petitioner has not supported its request with affidavits of a person or persons having personal knowledge, as required by Commission Rule 1.229(c). See *Tri County Broadcasting Company*, 27 FCC 2d 1013, 21 RR 2d 380 (1971); and *Jay Sadow* (*WRIP*), 27 FCC 2d 248, 20 RR 2d 1171 (1971). A staff of seven full time employees for an FM radio station to be located in a small community is not unreasonable on its face. See *Martin Lake Broadcasting Company*, 23 FCC 2d 721, 19 RR 2d 277 (1970). Furthermore, Hunt in his opposition has adequately answered petitioner's allegations that he has not provided for an operator holding a first class radiotelephone license. Hunt has indicated that at least one of his proposed employees holds a radiotelephone third class operator permit, and, under the requirements of Rule 73.265, a third class operator is authorized to perform the operations of the transmitter for a facility with an output of less than 25 kilowatts.

FINANCIAL ISSUES

15. Petitioner next requests the addition of four financial issues against Hunt. For the sake of clarity, we will deal with each issue separately.

A. DEBT FUNDING

16. A financial issue is warranted, Lexington County argues, to explore Hunt's financing proposal, because, of the $91,767 Hunt claims

[10] Petitioner lists Hunt's proposed staff as follows: a general manager, a station manager, bookkeeper, and four announcers.

in available funds, only $2,400 will be contributed by Hunt as equity capital while $90,000 will be derived from a loan. This represents a debt-equity of nearly 36:1, Lexington County submits, and the Commission in the past has designated financial issues where the debt equity ratios were only 11:1 and 10:1, citing *5KW, Inc.*, 33 FCC 2d 895, 23 RR 2d 1015 (1972); and *Greenfield Broadcasting Corporation*, 32 FCC 2d 135 (1971).

17. The Review Board is of the opinion that an amendment to Hunt's application, filed September 9, 1972, answers petitioner's allegations with respect to Hunt's proposed debt-equity ratio. By Order, FCC 72M–1339, released October 27, 1972, the Administrative Law Judge accepted Hunt's amendment, in which he proposes to finance the construction and first year operation of his station with a $31,000 line of credit from an equipment supplier, a bank loan of $58,500,[11] and a $17,500 cash contribution by Hunt, thereby, reducing Hunt's proposed debt-equity ratio of 36:1 to a ratio of approximately 5:1. We do not believe that a debt-equity ratio of 5:1, standing alone, warrants further inquiry at the hearing. See *Radio Antilles, Inc.*, 20 FCC 2d 250, 17 RR 2d 626 (1969).

B. CONTINUING OPERATING ABILITY

18. Lexington County also insists that Hunt's plan to defer $15,000 in principal repayments to the second year raises questions as to his ability to continue operation into the second year. It is argued that, according to Hunt's proposed figures, he will have, after he has met his construction costs and first year expenses, a cushion of only $7,396 to help finance second year amortization costs of $28,533 (based on deferred principal repayment of $15,000, interest on loan of $6,000, and principal and interest on equipment credit of $7,533) and second year operating expenses of $39,650 (based on first year costs). A financial issue is warranted, Lexington County argues, to determine Hunt's ability to meet these continuing costs. Hunt and the Broadcast Bureau oppose the request.

19. In the cases cited by Petitioner (*Greenfield Broadcasting Corp.*, 32 FCC 2d 135 (1971); *A–C Broadcasters*, 10 FCC 2d 256, 11 RR 2d 359 (1967); and *5 KW, Inc., supra*), and in a recent Review Board Memorandum Opinion and Order, *Robert Cowan Wagner*, 38 FCC 2d 1187, 26 RR 2d 429 (1973) appropriate issues were specified because of factors which strongly suggested that the applicant could not meet his second year costs of operation and continue to operate. Thus, the applicants had deferred repayment of substantial amounts on loans into the second year of operation; the applicant in at least one case (*5 KW*) was pledged to repay his loans in full in the second year and the loans were secured by third persons who were either not corporate stockholders or only minor preferred stockholders and, therefore, there was no indication that they would extend repayment of loans

[11] In a letter submitted with Hunt's September amendment, Julian B. Turner, vice president, Bankers Trust of South Carolina, states that the Bank is committed to lend Hunt $58,500 at 8 percent per annum, payable in sixty (60) equal monthly payments of $975, plus interest.

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beyond the due date in the event of financial difficulties; the applicants had set up an extremely thin corporate structure with a very high debt equity ratio; and, finally, there was no showing by the applicants that they could raise necessary funds either through revenues or other means to meet these second year expenses.[12] None of these factors are present in this case. According to Hunt's amended financial proposal, his bank loan repayments will commence 13 months after the date of the loan and will be payable in sixty (60) equal monthly payments of $975, plus interest.[13] Hunt, in his opposition, calculates that his principal and interest payments on the bank loan will be $16,380 for the first year. In addition to the loan repayments, Hunt maintains that payments on principal and interest for equipment will total $7,533; consequently, his total outlay for his second year in operation is $63,563. Hunt claims that his $7,000 cushion and his first year revenues should meet these second year expenses; and we do not find this proposal to be unreasonable. Furthermore, repayments due on the loans for the equipment are not as substantial as in the cases cited above. We are not confronted here with a thinly structured corporation; Hunt is an individual applicant who proposes to contribute $17,500 [14] of his own funds to his proposed station and has secured a bank loan with a 128 acre farm with an alleged market value of $77,000. Under these circumstances, we perceive no adequate reason to inquire beyond the ordinary financial standard, *i.e.* costs of construction and first year's operation.

C. AVAILABILITY OF FUNDS

20. According to petitioner, the joint balance sheet of the applicant and his wife, dated January 10, 1972, shows a total of $5,000 in current assets. However, the joint balance sheet was filed before Mrs. Hunt purchased, for $4,000, forty shares of stock in Forjay Broadcasting Corporation (see paragraph 2, *supra*). Petitioner maintains that a $4,000 reduction in Hunt's current asset position of $5,000 would leave only $1,000 from which Hunt can meet his current liabilities of $2,525.16 plus his proposed capital contribution of $2,400. Therefore, an issue is warranted, petitioner asserts, to determine whether Hunt can meet his capital contribution. The Board believes that an issue is not warranted. Petitioner presents no factual allegations to refute Hunt's assertion that the Forjay stock was purchased by Mrs. Hunt out of her separate funds and consequently would not effect their joint balance sheet.[15] Furthermore, Hunt's September 19th amendment reveals that he has increased his current liquid asset position by $15,000 for a total of $20,000, and has increased his capital contribution from $2400 to $17,500. It appears that he has sufficient current liquid assets to meet his commitment.[16]

[12] See *Robert Cowan Wagner, supra; 5 KW, Inc., supra.*
[13] See note 10, *supra.*
[14] See paragraph 17, *supra.*
[15] *Cf. Home Service Broadcasting Corporation,* 21 FCC 2d 168, 18 RR 2d 63 (1970).
[16] See *California Stereo, Inc.,* FCC 73R–35, released January 19, 1973; and *Grenada Broadcasting Co.,* 22 FCC 2d 814, 18 RR 2d 115 (1970).

D. UNDERESTIMATION OF COSTS

21. Finally, petitioner alleges that Hunt has not made provision for the following construction costs: studio furniture; record and tape library; FCC grant fees which will total $900; and payment of $350 for an option to acquire a tower site lease. Out of an operating costs figure of $39,650, $28,000 is estimated for staff salaries, petitioner asserts: however, Hunt's staffing proposal,[17] is unrealistic and therefore raises doubts as to whether Hunt has made adequate financial provisions for staffing. In particular, petitioner argues that Hunt has failed to provide for: a first class radio telephone operator; secretaries and administrative personnel; maintenance personnel; commissions for news stringers Hunt intends to employ; and part time announcers. Furthermore, Lexington County states, Hunt has overlooked other operating cash requirements such as, SESAC (music licensing group) fees; contingency funds to meet tax escalation clause in tower site lease; state Unemployment Compensation Tax; and Employer's contribution to federal withholding tax.[18]

22. The Review Board agrees with both the Broadcast Bureau and Hunt that an issue is not warranted. Petitioner's request is premised on speculation and surmise and is procedurally deficient in that it lacks supporting affidavits from individuals with personal knowledge of the facts alleged, as required by Commission Rule 1.229(c). We believe that Hunt's estimates for construction and operating costs are not unreasonable on their face and that Hunt has satisfactorily explained in his responsive pleading how he plans to meet the costs mentioned by petitioner. See *WPIX, Inc.*, (*WPIX*), 22 FCC 2d 960, 18 RR 2d 1196 (1970); *Virginia Broadcasters*, 22 FCC 2d 250, 18 RR 2d 928 (1970). Thus, Hunt explains that studio furniture, record and tape library, grant fees and extension of the options on the transmitter site expenses are already covered or will be covered by the $2,500 miscellaneous funds indicated in Hunt's application. The claim that Hunt has not conformed with the Commission rules or has unrealistically provided for such staff persons as a first class radiotelephone operator, secretaries and administrative personnel, maintenance personnel, part time announcers, etc., disregards the fact that Hunt has proposed a staff of seven full time employees who can perform substantially all the above functions, except for a first class operator. (See paragraph 12, *supra*.) Furthermore, we do not believe Hunt's estimates for legal expenses are unreasonable. Finally, the other allegedly omitted expenses (see paragraph 20, *supra*) have not been shown by petitioner to be such that Hunt cannot meet them with his miscellaneous fund of $2,500, or from his surplus of available funds of approximately $7,000.[19]

[17] See paragraph 13, *supra*.

[18] Lexington County also challenges Hunt's legal costs. In Hunt's petition to enlarge issues against Lexington County, filed September 5, 1972, Hunt asserted that legal costs in this proceeding would total $10,000, which exceeds by $2,000 Hunt's February, 1972 estimate for legal costs of $8,000.

[19] Lexington County concedes in its reply that its allegations in support of a site availability issue against Hunt have been satisfactorily answered in Hunt's opposition. The Board agrees and no further discussion of the requested site availability issue is therefore necessary.

23. Accordingly, IT IS ORDERED, That the motion to dismiss, filed February 27, 1973, by William D. Hunt, IS GRANTED; and that the petition to accept pleading, filed December 27, 1972, and the petition to accept addendum, filed January 20, 1973, by Lexington County Broadcasters, Inc., ARE DENIED; and that all other pleadings filed subsequent to October 12, 1972 (see footnote 2 of this Memorandum Opinion and Order) ARE DISMISSED; and

24. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed September 5, 1972, by Lexington County Broadcasters, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-395

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Applications of	
MISSION CABLE TV, INC., SAN DIEGO, CALIF.	CAC-17 (CA335)
MISSION CABLE TV, INC., EL CAJON, CALIF.	CAC-18 (CA330)
MISSION CABLE TV, INC., CHULA VISTA, CALIF.	CAC-19 (CA329)
MISSION CABLE TV, INC., NATIONAL CITY, CALIF.	CAC-20 (CA419)
MISSION CABLE TV, INC., LA MESA, CALIF.	CAC-21 (CA332)
MISSION CABLE TV, INC., SAN DIEGO COUNTY, CALIF.	CAC-22 (CA420)
MISSION CABLE TV, INC., IMPERIAL BEACH, CALIF.	CAC-23 (CA421)
PENASQUITOS ANTENNA SYSTEM, INC., RANCHO DE LOS PENASQUITOS, CALIF.	CAC-124 (CA422)
PENASQUITOS ANTENNA SYSTEM, INC., MIRA MESA, CALIF.	CAC-125 (CA423)
SOUTH BAY TERRACES ANTENNA SYSTEM, INC., SOUTH BAY TERRACES, CALIF.	CAC-126 (CA424)
UNIVERSITY CITY ANTENNA SYSTEM, INC., UNIVERSITY CITY, CALIF.	CAC-135 (CA425)
TIERRASANTA CABLE TV ASSOCIATION, TIERRASANTA, CALIF.	CAC-136 (CA387)
ECI ELECTRONICS, INC., D.B.A. CARRIAGE HILLS CABLE TV, CARRIAGE HILLS, CALIF.	CAC-137 (CA426)
SOUTHWESTERN CABLE CO., SAN DIEGO, CALIF.	CAC-159 (CA428)
TELEVENTS OF CORONADO, INC., CORONADO, CALIF.	CAC-307 (CA431)
THE TIMES MIRROR CO., SAN DIEGUITO, CALIF.	CAC-784 (CA478)
LOMAS SANTA FE, INC., D.B.A. SAN DIEGUITO CABLE TV, LOMAS SANTA FE, CALIF.	CAC-966 (CA504) CSR-265
LOMAS SANTA FE, INC., D.B.A. SAN DIEGUITO CABLE TV, VILLAGE PARK, CALIF.	CAC-967 (CA505) CSR-266
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted April 11, 1973; Released April 19, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT.

APPLICATIONS

1. The captioned Certificate of Compliance applications propose new cable television operations or the addition of television broadcast

signals to existing systems in the San Diego, California, television market (#51). Applicants' proposals are as follows:

Mission Cable TV, Inc.; City of San Diego

2. Mission Cable TV has a franchise granted August 1, 1963, for that portion of the City of San Diego "lying southerly of the San Diego River Channel." Its application is for that portion of this franchise area in which it has not been permitted to carry television broadcast signals from Los Angeles pursuant to Commission order.[1] Mission indicates that it is operating in portions of this expansion area carrying the signals of the following television stations:

XETV (ABC, Channel 6), Tijuana.
KFMB (CBS, Channel 8), San Diego.
KOGO (NBC, Channel 10), San Diego.
KCST (Ind., Channel 39), San Diego.
KPBS–TV (Educ., Channel 15), San Diego.
XEWT–TV (Spanish Language, Channel 12), Tijuana.

Mission proposes addition of the following signals:

KNBC (NBC, Channel 4), Los Angeles.
KCOP–TV (Ind., Channel 13), Los Angeles.
KTLA–TV (Ind., Channel 5), Los Angeles.
KTTV–TV (Ind., Channel 11), Los Angeles.
KMEX–TV (Spanish Language, Channel 34), Los Angeles.

3. Mission indicates that KNBC and KCOP–TV are significantly viewed in San Diego and may thus be carried under Section 76.63(a) of the Rules as it relates to Section 76.61(a)(1)–(2); that KTLA–TV and KTTV–TV are independent stations that may be carried under Section 76.63(a) of the Rules as it relates to Section 76.61(c); and that KMEX–TV is a station broadcasting in the Spanish language and may be carried under Section 76.63(a) as it relates to Section 76.61(e).

4. Mission further indicates that it will comply with Section 76.251(a) of the Rules as follows:[2]

(a) the cable plant, with its attendant electronics and passive devices, will be capable of passing a bandwidth of 50 to 260 MHz, the equivalent of 35–6 MHz channels;

(b) the two-way communications capacity will be met by a combination of dual trunk cables and high/low filters on the feeder lines;

(c) one channel will be reserved and specially designated a public access channel, available on a first-come, non-discriminatory basis;

(d) one channel will be specially designated for use by local educational authorities;

(e) one channel will be specially designated for local government use;

(f) one channel will be designated as the system's origination cablecasting channel;

[1] This order is found in the Commission's *Memorandum Opinion and Order in Docket 16786*, 13 FCC 2d 478 (1968). By virtue of this, and a number of other similar orders, certain cable television systems have been prohibited from expanding their operations carrying certain specified signals. However, as long as carriage of these signals was not involved, continued expansion was permitted. By *Memorandum Opinion and Order in Docket 18397–A*, 34 FCC 2d 304 (1972), the Commission ruled that cable systems so limited could not expand carriage of signals previously restricted by specific order but now consistent with the cable television Rules without first obtaining Certificates of Compliance.

[2] In this respect Mission has gone considerably beyond the strict requirements of the Rules, which would not be fully applicable to the Mission Cable TV operation until March 31, 1977. See Section 76.251(c).

(g) other portions of the non-broadcast bandwidth would be offered for leased access use, including one channel on which priority would be given to part-time users;

(h) production facilities would be available free of charge for live studio presentations of less than five minutes on the access channel.

Mission Cable TV, Inc.; El Cajon, Chula Vista, National City, La Mesa, San Diego County

5. Pursuant to franchises granted by the County of San Diego on December 7, 1962, and by the cities of El Cajon on May 8, 1961, Chula Vista on April 7, 1964, National City on February 25, 1964, and La Mesa on May 9, 1963, Mission is operating cable television systems in these four cities and in certain unincorporated areas of the County of San Diego.[3] In each of these communities Mission proposes to carry the same signals and provide the same type of nonbroadcast services and facilities as it has proposed for the City of San Diego expansion area.

Mission Cable TV; Imperial Beach

6. Mission has a franchise, effective November 19, 1971, to operate in Imperial Beach but has not yet commenced operation there. It proposes to carry the same signals and provide the same type of nonbroadcast services and facilities as have been proposed for the City of San Diego.

7. Because the Imperial Beach system is not yet operational, Mission is under an obligation to show either that its franchise complies with the franchise standards of the Rules (Section 76.31), that the franchise was granted before March 31, 1972, and is in substantial compliance with the Rules, or that, relying on the franchise, significant financial investments have been made or binding contractual agreements entered into. In this respect Mission states that its franchise was granted prior to March 31, 1972, and is in substantial compliance with Section 76.31 of the Rules. Mission indicates that its qualifications were considered in a full public proceeding affording due process before the franchise was granted, that the franchise establishes a rigid construction schedule, that the franchise is for 15 years with provision for a 15 year renewal, that subscription rates are included in the franchise and are subject to regulation by the city council, that a local business office must be maintained, and finally that the franchise provides procedures for modifying the franchise ordinance in the event of changes in the Commission regulations. The franchise fee specified is five percent and that is said to be within the range of reasonable fees established by the Commission and is less than the six percent fee which the Commission indicated on reconsideration of the Rules might, in appropriate cases, be found to constitute substantial compliance.[4]

Penasquitos Antenna System, Inc.; Rancho de los Penasquitos

8. Penasquitos Antenna System is operating a cable television system in Rancho de los Penasquitos, pursuant to a franchise granted by

[3] Mission's existing operations in these communities are subject to the restraints of the same Commission order referred to in footnote 1, *supra*.

[4] *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 366 (1972).

the City of San Diego in February of 1969. Los Penasquitos is described by the applicant as a highly integrated community stretching from U.S. 395 to the Pacific Ocean in a 20 square mile development. It is within the limits of the City of San Diego approximately 9 miles southwest of Escondido and directly adjacent to Rancho Bernardo. Existing and proposed signal carriage is identical to that of Mission Cable TV, except that KCET, a Los Angeles noncommercial educational television station placing a Grade B contour over Rancho de los Penasquitos, would also be carried. Carriage of these signals is said to be consistent with Section 76.63 of the Rules.

9. Compliance with the access and nonbroadcast provisions of the Rules is proposed as follows:

(a) the system is operating with a 12-channel capacity, and will be converted to a 20-channel capacity;
(b) the system will provide bandwidth for non-broadcast uses equivalent to the bandwidth used for broadcast purposes;
(c) the system will expand channel capacity as existing channel availability is exhausted, in compliance with the Commission's "N+1" availability concept;
(d) the system will dedicate one free, non-commercial public access channel available at all times on a first-come, first-served, nondiscriminatory basis pursuant to the Commission's standards and to more detailed rules which will be adopted by the system;
(e) the system will have available production facilities for public use in connection with the public access channel;
(f) the system will allocate one channel each for local government and local educational use, available without charge during the first five years;
(g) the system will offer all excess channel capacity for leased access services;
(h) the system will have the capacity for two-way non-voice return communications;
(i) the system will exercise no control over program content except to the extent necessary to insure compliance with the operating rules described in § 76.251(a)(11) of the Commission's Rules.

Penasquitos Antenna System, Inc.; Mira Mesa

10. Penasquitos Antenna System additionally operates a cable television system in Mira Mesa pursuant to a franchise granted by the City of San Diego on February 9, 1972. Mira Mesa is also described as an integrated community and is located directly south of Rancho de los Penasquitos. The signals presently carried, the signals proposed for carriage, and the access channels and facilities are identical to those proposed for Rancho de los Penasquitos.

South Bay Terraces Antenna System, Inc.; South Bay Terraces

11. South Bay Terraces Antenna System, under the same ownership as Penasquitos Antenna System, Inc., contemplates carrying the same signals and providing the same access services and facilities as the Penasquitos system. The system is in operation pursuant to a franchise granted on December 30, 1969 by the City of San Diego. South Bay Terraces is located within the City limits of San Diego, but is to the south and set apart from the main portion of the City adjacent to National City.

University City Antenna System, Inc.; University City

12. This system is also operating, is commonly owned with the Penasquitos and South Bay Terrace systems, and is proposing the

same services. It is operating under a City of San Diego franchise granted in August of 1969. The community is described as a highly integrated community of about 2,300 acres located well north of the main area of San Diego and east of La Jolla.

Tierrasanta Cable TV Association; Tierrasanta

13. Tierrasanta Cable TV Association is operating a cable television system in Tierrasanta, a community due north of the central city of San Diego but within the city limits. It is operating pursuant to a City of San Diego franchise granted on February 9, 1971. The existing service and that proposed is identical to that of the four above-described systems.

ECI Electronics, Inc., d/b/a Carriage Hills Cable TV; Carriage Hills

14. Carriage Hills Cable TV, under common ownership with Tierrasanta Cable TV Association, is operating a cable television system in Carriage Hills, pursuant to a San Diego County franchise granted in September of 1969. Carriage Hills is an unincorporated subdivision development located four miles southeast of the City of San Diego comprising about 1,000 acres. The existing service and that proposed is identical to that of the five above-described systems.

Southwestern Cable Company; City of San Diego

15. Southwestern Cable Company has a franchise granted September 24, 1964, for "all areas within the Corporate limits of the City of San Diego lying northerly of the San Diego River Channel, excepting and excluding the Rancho San Bernardo CATV franchise service area". Like Mission Cable TV, Southwestern is subject to a Commission order limiting to a discrete area its carriage of television broadcast signals from Los Angeles. Its application is for that portion of its franchise area where its operation has been limited by Commission order. Southwestern's proposed signal carriage is the same as that of Mission Cable TV, except that it does not propose carriage of Television Station KMEX–TV, Los Angeles or XEWT–TV, Tijuana, both of which are Spanish language stations.

16. Southwestern's showing of compliance with Section 76.251 of the Rules indicates:

(a) A dual cable system will be installed with a minimum bandwidth of 50–260 MHz on each cable in the forward direction. This will provide an immediate capacity of 24 channels expandable to 60 channels through the installation of converters.

(b) The 5–30 MHz spectrum on one or both of the cables will be reserved for transmission of information in the reverse direction. The system will have the transmission capability of feeds in the return direction from any subscriber location.

(c) A specially designated non-commercial public access channel will be maintained and available on a first come, non-discriminatory basis. Equipment and facilities necessary for the production of programming for this channel will be made available for public use.

(d) One channel will be maintained and specially designated for use by local educational authorities.

(e) One channel will be maintained and specially designated for local government use.

(f) Other portions of the system's nonbroadcast bandwidth will be made available for leased access services.

Televents of Coronado, Inc.; Coronado

17. Televents of Coronado proposes to commence operation of a new cable television system in Coronado pursuant to a franchise issued by the City of Coronado on December 14, 1971. The City of Coronado is located on the spit of land that separates San Diego Bay from the Pacific Ocean. Televents proposes carriage of the same signals as Mission Cable TV, except that carriage of television station KMEX–TV, Spanish language, Los Angeles, is not proposed and carriage of noncommercial educational television station KCET, Los Angeles is proposed.

18. Televents indicates that it will have a dual cable plant with each cable having a capacity of 27 channels, or a total system capacity of 54 channels. Two-way capability will be incorporated into the plant. As part of its public access obligation, Televents indicates that it will maintain a local studio with color cameras and other production accessories and facilities necessary for the production of programs. As required by the Rules, channels will be maintained for public, educational, local government and leased access purposes.

19. To show compliance with Section 76.31 of the Rules, Televents indicates that its franchise was granted prior to March 31, 1972, and that not only has it made significant financial investments and entered into binding contractual agreement in reliance on the franchise, but that the franchise is in any event in substantial compliance with the requirements of the Rules. As of March 31, 1972, approximately $85,000 is said to have been spent in reliance on the franchise. The franchise is said to be in substantial compliance with the Rules because:

(a) the franchise was awarded after a full public proceeding affording due process at which the City Council passed on Televents' legal, financial and technical qualifications and its construction plans;

(b) the franchise requires substantial completion of the trunk and distribution lines within ten months after acceptance of the franchise;

(c) rates for subscribers are set forth in the franchise and may not be changed without amending the franchise, which must be done in a public proceeding;

(d) the franchise empowers the City Manager to prescribe rules and regulations and to settle any controversy concerning cable operations including subscriber complaints;

(e) Televents will maintain a business office in the community;

(f) Televents promises it will take affirmative action to seek modification of the franchise to conform with any further changes in the Commission's Rules.

The Times Mirror Company; San Dieguito

20. The Times Mirror Company operates in the San Dieguito area of San Diego County pursuant to a franchise granted by the County on June 29, 1965. The San Dieguito area is located north of the City of San Diego and to the west of the City of Escondido. Existing and proposed signal carriage is the same as that involved in the Mission Cable TV applications except that KLXA–TV, Spanish language, Channel 40, Los Angeles, is also proposed for carriage.

21. Times Mirror also promises that it will provide the public, educational, local government, and leased access channels required by Section 76.251(a)(4)–(7) of the Rules; that additional channels will be made available for these functions in accordance with the formula specified in Section 76.251(a)(8) of the Rules; and that the required production facilities will be maintained and kept available for use by the public.

Lomas Santa Fe, Inc., d/b/a San Dieguito Cable TV; Lomas Santa Fe

22. San Dieguito Cable TV is the operator of an existing cable television in Lomas Santa Fe which is described as an unincorporated area of San Diego County bounded by Manchester Drive to the north, El Camino Real to the east, Via de la Valle to the south, and Interstate 5 freeway to the west.[5] Applicant is the developer of this community which is described as partially master planned but undeveloped. As of the date of the application it had 180 subscribers. The following television broadcast signals are now being carried:

XETV (ABC), Tijuana.
KFMB (CBS), San Diego.
KOGO (NBC), San Diego.
KCST (Ind.), San Diego.
KPBS–TV (Educ.), San Diego.

Addition of the following signals is proposed:

KNBC (NBC), Los Angeles.
KCOP–TV (Ind.), Los Angeles.
KNXT (CBS), Los Angeles.
KABC–TV (ABC), Los Angeles.
KTLA–TV (Ind.), Los Angeles.
KTTV–TV (Ind.), Los Angeles.
XEWT–TV (Spanish Language), Tijuana.

23. With respect to the signals proposed to be added, San Dieguito Cable TV provides the following justification: KNBC and KCOP are to be carried as significantly viewed pursuant to Section 76.54(a) of the Rules; KTLA–TV and KTTV–TV are permitted as the first and second additional independent stations; and XEWT–TV is to be carried as a television station broadcasting predominantly in a non-English language. Concerning KNXT, applicant states that it "is also significantly viewed in the community of the system although it is not listed in Section 76.54. Applicant can make no special showing because of the small number of homes in the community but from its own experience knows that KNXT is significantly viewed in the community according to the definition in 76.5(k)." KABC–TV is proposed for carriage as the "nearest in-State full network station for the American Broadcasting Company Network."

24. Concerning its obligations under the access channel and non-broadcast facilities provisions of the Rules, San Dieguito Cable TV

[5] When public notice of the receipt of this application was given by the Commission on August 31, 1972, the community involved was shown as Solona Beach. Upon closer inspection it appears that the application is only for the Lomas Santa Fe portion of Solona Beach.

states that it will provide the necessary public access, educational access and government access channels as well as the required production facilities if it is required to do so. However, applicant requests a waiver of these requirements so that it will not have to comply with the requirements of Section 76.251(a)(4)–(11) until it has 2,000 subscribers. It cites the undue burden that compliance with these Rules would otherwise place on it.

Lomas Santa Fe, Inc., d/b/a San Dieguito Cable TV; Village Park

25. San Dieguito Cable TV is carrying and proposes to carry the same signals in Village Park as it proposed for Lomas Santa Fe. It also makes the same undertaking and requests the same waiver of the access and nonbroadcast facilities requirements of the Rules. Village Park is described as located in an unincorporated area of San Diego County bounded by Manchester Drive to the south, La Costa Avenue to the north, and undeveloped area east of Encinitas to the west and the undeveloped area west of Olivenhain to the east.[6] Only 150 subscribers are said to have been connected at the time the application was filed.

RESPONSIVE PLEADINGS

26. In response to these applications, Midwest Television, Inc., licensee of Station KFMB–TV, CBS, Channel 8, San Diego, filed a "Petition for Special Relief and Objections to Applications for Certificates of Compliance."[7] Western Telecasters, Inc., licensee of Television Station KCST, Independent, Channel 39, San Diego, filed a similarly entitled pleading. McGraw-Hill Broadcasting Company, Inc., then proposed assignee of Television Station KOGO–TV, NBC, channel 10, San Diego, filed a statement of support for the Midwest Television special relief requests.[8] In response to the Mission Cable TV and the Televents of Coronado applications, the Board of Trustees, the California State University and Colleges for San Diego State College, licensee of noncommercial educational television station KPBS–TV, filed requests for orders to show cause concerning proposed carriage of noncommercial educational television stations KCST, Los Angeles and KPBS–TV, San Diego. The City of San Diego, through the City Attorney, also filed a pleading responsive to a number of these applications urging that they be granted and that the Commission not "rehash the issues previously considered by the Commission in its deliberations leading up to the [*Cable Television*] *Report and Order* . . ." Finally, Western Telecasters, Inc., filed a number of pleadings all urging consolidated consideration of these applications.[9]

[6] This application was shown on the Commission public notice of August 31, 1972, to be for the community of Encinitas. It now appears that the application is only for the Village Park section of Encinitas.

[7] KFMB's pleading is directed against all of the applications discussed herein except for those for San Dieguito, Lomas Santa Fe, and Village Park.

[8] McGraw-Hill is now the licensee of channel 10 and the station's call letters have been changed to KGTV. Because this change in call letters occurred after receipt of the applications and pleadings here involved, we have continued to refer to the station by its old call letters.

[9] That request, to the extent indicated herein, is granted.

DISCUSSION OF APPLICATIONS

27. These pleadings involve, first, the question of whether the service proposed in the eighteen captioned applications are consistent with the Rules, and, second, assuming the service is consistent with the Rules, whether we should impose "additional or different requirements" on these cable television operators pursuant to the special relief provision of Section 76.7 of the Rules.[10]

28. We turn first to the question of whether the service proposed is in compliance with the Rules. The opposition pleadings in general acknowledge that the service proposed is in compliance with the Rules. In particular, and with the exception of the KPBS–TV pleading, there appears to be a general acknowledgment that the signal carriage proposed is consistent with the Rules and would, in the absence of special relief, be permitted.[11] The KFMB petition, however, raises a number of questions concerning compliance with the franchise standards and access obligations of the Rules by Televents of Coronado, Penasquitos Antenna System, South Bay Terraces Antenna System, University Antenna System, Tierrasanta Cable TV Association, and Carriage Hills Cable TV.

29. Concerning the Televents application, KFMB notes that the franchise term is for 20 years in contrast to the 15 year maximum specified in the Rules, that the 5 percent franchise fee has not been justified, that the Coronado franchising system is deficient in its failure to require applicants to establish their legal and character qualifications, that no Form 325 accompanied the application, and that Televent's explanation of how it intends to comply with the access channel requirements is not sufficiently explicit. Following the submission of the KFMB petition and also following our *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order* clarifying and amending the Rules in a number of respects, Televents filed an amendment to its application responding to a number of the points raised by KFMB. We now find Televent's application to be acceptable under the Rules. First, concerning compliance with the franchise standards of the Rules, Televents indicates that it spent approximately $85,000 prior to March 31, 1972, in reliance on its franchise. We find on the basis of this expenditure that Televents is entitled, under the proviso to Section 76.31 of the Rules,[12] to have until March 31, 1977, to bring its franchise into full compliance with the Rules. We note further that Televent's franchise appears to be in sub-

[10] Section 76.7(a) states "Upon petition by a cable television system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the Rules relating to cable television systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question."

[11] It should be noted here that KFMB did not respond to the Village Park and Lomas Santa Fe applications and the KCST response to these applications simply incorporated by reference its earlier response to CAC's 17–23, 124–126, 135–137, 159, and 307.

[12] This provision of the Rules states in pertinent part that the Commission may waive consistency with the franchise provisions of the Rules for a cable system not in operation prior to March 31, 1972, that "relying on existing franchise made a significant financial investment or entered into binding contractual agreements prior to March 31, 1972 . . ."

stantial compliance with the Rules.[13] The franchise fee of 5 percent of gross annual receipts comes within the limits of our statement on reconsideration of the Rules that "The delay attendant to renegotiation of a franchise fee requiring a 6% franchise fee would do more of a disservice to the public we are trying to protect than would the fee itself . . ." [14] Because the Certificate here applied for would not in any case extend beyond March 31, 1977, without a showing of full compliance with the Rules, we find that the twenty year franchise period specified here does not contravene the policy of the Rules.[15] Televents has stated unequivocally that its qualifications to operate a cable television system were fully considered by the City of Coronado before it received a franchise and we have no reason to doubt the truth of that statement.

30. Finally, we find Televent's explanation of its plan in the access area sufficient to show that it will be in compliance with the Rules in this respect [16] and that the amendment to its application has otherwise mooted the specific objections of KFMB.

31. Concerning the Penasquitos Antenna System applications and the others proposing the same service (South Bay Terraces, University City, Tierrasanta and Carriage Hills), KFMB also questions the adequacy of the systems' explanation of their plans for compliance with the access requirements of the Rules. The applications are said to be inconsistent on their face in that twelve broadcast signals are proposed for carriage on a twenty channel system and at the same time an equal number of broadcast and nonbroadcast channels are promised.

32. In reply, these applicants deny that the explanation of their plans in the access area are not specific enough and reaffirm their undertaking to provide equivalent bandwidth for broadcast and nonbroadcast uses as required by the Rules.

33. Because these systems are already in operation, full compliance with the access requirements of the Rules is not required until March 31, 1977.[17] Because of the signals to be added, however, there is an obligation to comply in part with the provisions of Section 76.251(a)(4)–(11). The requirement that an equal number of broadcast and nonbroadcast channels be provided is not presently applicable. In view of this and the applicants' unequivocal statements that they will fully comply with the requirements of the Rules when applicable, we cannot agree with KFMB's allegation that an acceptable explanation of these applicants' access plans has not been received. We find the service proposed in these applications to be in full compliance with the Rules.

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[13] Applicants with franchises received prior to March 31, 1972, need only show "substantial" compliance with the franchise standards of Section 76.31 of the Rules. See *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order, supra.*, paragraph 115. In *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10 (1972), we indicated the term "substantial compliance" would be liberally construed in view of the short period until full compliance will be required and in order not to further delay making cable television service available to the public.

[14] 36 FCC 2d 326, para. 115 (1972). See also, for example, *Texarkana TV Cable Company, Inc.*, FCC 72–1010, 38 FCC 2d 81 (1972).

[15] Cf. *Memphis CATV, Inc.*, FCC 72–1191, 38 FCC 2d 894 (1972).

[16] Cf. *Viking Media Corporation*, FCC 72–875, 37 FCC 2d 605 (1972).

[17] See Section 76.251(c).

34. Although not raised in the opposition pleadings, the San Dieguito Cable TV applications for Lomas Santa Fe and Village Park, raise questions of consistency in a number of other respects. First, carriage of KABC–TV is proposed as the "nearest in-State full network station for the American Broadcasting Company." Because the signal of XETV is already carried on these systems and is affiliated with the American Broadcasting Company, the proposed carriage of KABC–TV is inconsistent with the Rules and its carriage must accordingly be denied. Second, KNXT is proposed for carriage based on the applicant's knowledge [18] that the signal is significantly viewed. Such a showing fails to provide us with any objective standard for reviewing whether the signal in question is in fact significantly viewed and fails to comply with the requirements of Section 76.54 of the Rules. We will accordingly deny the request for carriage of KNXT.

35. San Dieguito Cable TV finally raises on its own the question of compliance with the access requirements of the Rules by agreeing to comply if necessary, but requesting waiver of the obligations for both the Lomas Santa Fe and Village Park systems until 2,000 subscribers are obtained. We agree that full compliance with the provisions of the access rules with only the small number of existing subscribers would be an unreasonable burden to place on these systems and will accordingly grant a limited waiver of the Rules until 2,000 subscribers have been obtained on these systems. Applicant has, however, provided little factual information concerning the details of its operations so that we believe it appropriate to limit this waiver in a number of respects. Thus, while we will waive all obligations on these systems to provide or maintain production facilities, we will require them, within the limits of their channel capacity, to make available as demanded channels for local government, local educational and leased access uses. Further, should there be a demand for public access, applicant should be prepared to respond with the required channel space even though we will not require that production facilities be made available until the 2,000 subscriber mark is reached.

36. The only remaining matter that might be considered to raise the question of whether these applications propose service consistent with the Rules are the petitions of The Board of Trustees, The California State University and Colleges for San Diego State College, licensee of Television Station KPBS–TV. The first of these petitions, although captioned with the file number of the Mission Cable TV Certificate of Compliance applications, requests the Commission to issue a show cause order to Mission as to "(a) why a Commission order to cease and desist carrying Channel 28, Los Angeles, California, should not issue forthwith, and (b) why a Commission order to cease and desist from carrying KPBS–TV on the CATV system's Channel 12 should not issue forthwith." [19]

37. Concerning carriage of noncommercial education television station KCET, Channel 28, Los Angeles, KPBS–TV states it has legal

[18] This knowledge is apparently that of applicant's Vice President who signed the applications.

[19] KPBS states that its petition is filed pursuant to Sections 1.91, 76.7, 76.17, 76.55(a)(2), 76.61(d) and 76.63 of the Rules.

standing to object to carriage under Section 76.61 of the Rules, and it does object because it is concerned "with the possible diversion of support to Channel 28, Los Angeles. KPBS needs every possible viewer in San Diego it can get and keep."

38. Concerning this argument, Mission Cable TV replies that, in deference to the wishes of KPBS–TV, it has not proposed carriage of KCET on non-grandfathered portions of its system but that continuation of existing carriage is authorized pursuant to Section 76.65 of the Rules.[20] Mission's position concerning continued carriage of KCST on the existing grandfathered portion of its cable television system operations appears to be correct and we accordingly deny KPBS's request in this regard.

39. KPBS's second point concerns carriage of KPBS, which broadcasts on channel 15, on Mission Cable TV's channel 12, which channel is said to suffer by virtue of interference from off-the-air broadcasts on channel 12, that, according to KPBS, makes the CATV signal on that channel "useless to cable subscribers in certain reception areas or with highly sensitive television receivers." Mission responds that it is willing to carry KPBS on cable channel 15 on the portions of its system for which certification is requested but that "on channel" carriage is not possible at the present time on the 12 channel cable facility that makes up the grandfathered portions of its system. Mission cities the *Second Report and Order in Docket 14895 et al.*[21] for the proposition that in these circumstances it has complete discretion as to the channel on which it will carry KPBS.

40. Because this aspect of KPBS's petition involves Mission Cable TV's existing operations rather than that portion for which certification is now sought, we do not believe it should stand as a bar to the requested Certificates of Compliance, particularly in light of Mission's agreement to revise its carriage plans on the non-grandfathered portions of its systems to afford KPBS "on channel" carriage. To the extent that KPBS seeks an order to show cause directed to existing grandfathered operations, we believe it is more appropriately acted upon apart from this proceeding. In this respect we note that similar concerns have been raised by other San Diego television stations in the past and that we have found it helpful to turn to informal procedures in an effort to assure that interference free carriage within the limits of the cable television system plant is provided.[22]

41. KPBS directed a similar petition to the Televents of Coronado application. Televents has not yet commenced operation so that it cannot be claimed that the signal of KPBS is being carried in a degraded fashion and we have no reason to suspect, nor does KPBS present any evidence to suggest, that its signal will be carried in a degraded manner. To the contrary, Televents in its reply to this petition affirms its intention to carry KPBS "without interference or

[20] Section 76.65 is entitled "Grandfathering provisions" and provides in relevant part that the broadcast signal carriage provisions of the Rules "shall not be deemed to require the deletion of any television broadcast or translator signals which a cable television system was authorized to carry or was lawfully carrying prior to March 31, 1972. . . ."

[21] 2 FCC 2d 725 at 754 (1966).

[22] See *Midwest Television, Inc.*, 28 FCC 2d 62 (1971).

material degradation and in accordance with the Commission's technical standards." Concerning Televents' proposal to carry the signal of television station KCET, KPBS states only that it "needs every possible viewer in San Diego it can get and keep" and that KCET's carriage should not be permitted. Because KPBS's request in this respect is totally unsupported it must be denied. Although we have expressed our concern that cable carriage of distant educational television stations might conceivably result in a loss of support for local stations we have also expressed our belief that, in the absence of contervailing considerations, the widest possible carriage of educational and public television programming is in the public interest. Thus we do not believe that the opposition of a local broadcaster should result in the automatic denial of distant signal educational television signal carriage. Such objection must be supported by probative evidence which we do not find present in this case.[23]

42. Finally, we have reviewed all of the 18 captioned applications in light of the procedural and substantive requirements of the Rules and, with the exception of those aspects of the San Dieguito Cable TV applications mentioned in paragraphs 34 and 35, *supra.*, we find all to show compliance with the requirements of the Rules.

DISCUSSION OF SPECIAL RELIEF PETITIONS

43. As indicated above, KFMB and KCST have responded to these applications with requests for special relief. KFMB requests that all of the applicants, other than Times Mirror Company and San Dieguito Cable TV to which it did not respond, be confined to carriage of "no more than two VHF commercial stations from outside the San Diego market." KCST asks that all of the applications be denied.

44. We turn first to the KFMB pleading which may be briefly summarized as follows:

pp. 1–5:	Introduction and summary of arguments.
pp. 5–8:	A brief description of the geography and demographics of the San Diego market and of the proposed cable television operations.
pp. 8–10:	Reference is made to the Commission's conclusion in the earlier San Diego cable television proceeding (Docket 16786) that "unlimited CATV expansion carrying Los Angeles signals would probably preclude or substantially impair potential UHF development in San Diego . . ."
pp. 10–13:	The goals of the rules adopted in the *Cable Television Report and Order* are reviewed.
pp. 14–16:	The San Diego market is described as unique in several ways bearing on cable television policy. San Diego County is said to include the entire 35 miles specified zone of San Diego and is the area from which virtually 100% of the audience of the San Diego stations is obtained. Because of the size and spread of the county, viewing habits in portions removed from the "Central Area"[24] are said to affect the county-wide viewing data sufficiently to cause the new CATV rules to operate in a perverted fashion in the Central Area.

[23] Cf. *Norristown Distribution Systems, Inc.*, FCC 72–1095, 38 FCC 2d 350 (1972).
[24] The KFMB defined "Central Area" is geographically the southwestern quarter of the county that includes the City of San Diego.

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pp. 16–23: Audience survey data is presented to show that in the Central Area of the county no Los Angeles signals are significantly viewed. To obtain this information KFMB asked the American Research Bureau to ascertain viewing shares and net weekly circulation in non-CATV homes in the Central Area from the same survey information that had been used as a basis for the Commission's list of significantly viewed signals. This recomputation of viewing information is said to show that none of the Los Angeles signals is signficantly viewed in the area. The new data shows:

	Share (percent)	NWC (percent)
KNBC	1.7	19.2
KCOP-TV	1.6	17.2

This data, KFMB states is "not offered to support deletion of 'significantly viewed' signals but rather to show, along with other evidence, the unique effect of the new rules in the San Diego market."

pp. 23–26: It is urged that KNBC's inclusion on the significantly viewed list was erroneous.[25] The ARB information supplied to the Commission and from which the list was compiled was rounded off to the nearest whole number. KFMB obtained from ARB the unrounded figures which, it is said, show KNBC had a net weekly circulation of only 24.5%, so that if the figures had not been rounded it would not have been included on the significantly viewed list.

pp. 26–32: A comparison with other markets is presented for the purpose of showing that the degree of outside signal carriage permitted in San Diego is disproportionate to levels allowed in the rest of the country. It is said that:

- There are 14 top-100 markets where 4 out of market signals may be carried. In only three of these would carriage be permitted throughout the entire metro area.
- In only two markets are carriage of 4 out-of-market signals from the top three markets permitted.
- In 22 markets three or more out-of-market independent signals may be carried. In only two of these are there operating UHF independent stations.
- In only eight of the top-100 markets could CATV carry three such signals (from the top three markets) under the new rules, of which six are in the top-50, and that San Diego is one of only two of these eight that has a UHF independent.
- In only 13 of the top-100 markets could CATV carry two or more significantly viewed signals in the metro area and thus not be subjected to exclusivity protection requirements.

pp. 32–36: It is urged that syndicated program exclusivity will provide little protection to stations in the San Diego market. During periods when protection is being given, other programs not protected against from other Los Angeles stations could be carried. No protection would be given against significantly viewed stations. Attached exhibit indicates that, in addition to network exclusivity protection, KFMB–TV would have 26.4% of its syndicated programming protected, KOGO 28.5%, and KCST 49%.

[25] This list is referred to in Section 76.54(a) of the Rules and appears as Appendix B to the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 378 (1972).

pp. 36–42:	KFMB urges that none of the applicants needs the additional level of Los Angeles signal carriage permitted by the new rules to underwrite the provision of non-broadcast service. The existing grandfathered operations of Mission and Southwestern are said to be sufficient in size to sustain non-broadcast services. Some but not all of the other systems are said to have a "captive" market by virtue of their operation in housing developments where outside antennas are not permitted. Finally, the complement of service available off-the-air in San Diego is said to belie any contention of a particular need for cable to augment broadcast services.
pp. 43–47:	The Commission is said to have already acknowledged the need for special relief by designating the market with an asterisk in its August 5, 1971, "Letter of Intent".
pp. 47–51:	It is said that the "significantly viewed" standards are unlawful as applied to San Diego because the Commission concluded in the earlier San Diego hearing that most of the homes in the market could not receive satisfactory off-the-air service from Los Angeles stations and because there is no record support for the proposition that the viewing levels are deemed "significant" for any pertinent purpose in the television industry.
pp. 51–53:	As discussed above, paras. 29–33, the Televents of Coronado, Penasquitos Antenna System, South Bay Terraces Antenna System, University City Antenna System, Tierrasanta Cable TV Association and Carriage Cable TV applications are said to be defective in failing to demonstrate compliance with the access and franchise Rules.

45. We have carefully reviewed KFMB's petition and find it unpersuasive insofar as it seeks special relief on its own behalf because it fails to establish, and in fact does not even attempt to establish, the critical nexus between the cable television operations proposed and any injury, present or future, to the television viewing public in the San Diego area.[26] Our records reflect, and KFMB does not dispute the fact, that it is a profitable television station, well able to provide undiminished service to the public.[27] And we are unable to agree with KFMB's assertions that we have already found that there will be adverse impact on service to the public by "asterisking" the market in our August 5, 1972, "Letter of Intent" or in the earlier San Diego market CATV hearing.

46. First, with regard to the asterisk on the San Diego market which KFMB says mandates the requested special relief, it should be noted that, insofar as the San Diego market is concerned, this involved a substantially different television signal carriage proposal than was finally incorporated into the Rules. The Letter of Intent, to which KFMB refers, represented one stage in the development of our existing cable television regulatory program.[28] Appendix B to that letter is a chart depicting the number of signals that cable systems would be permitted to carry in the designated cities of the top 100 television

[26] KFBM has acknowledged in its reply pleading that its case for special relief "does not include a particularized showing of adverse impact."

[27] KFBM's reply pleading refers us to its annual financial reports.

[28] The "Letter of Intent" is a letter sent August 5, 1971, to the Congressional leadership most directly involved in oversight of the Commission's cable television regulatory program. The letter outlined what the Commission considered at that time to be its "best judgment on the regulatory course that should be followed" in the cable television field. The text of the Letter of Intent may be found at 31 FCC 2d 115 (1971).

markets under the Rules then under discussion. The chart listed the San Diego market as follows:

Market	I Market signals		II Viewing test signals		III Additional signals		IV Total
	Net	Ind.	Net	Ind.	Net	Ind.	
51							
52[a] *San Diego, Calif.	3	1	1	4	2		11

47. Following submission of this letter to Congress, work on development of the Commission's regulatory program continued. The Rules finally adopted on February 2, 1972, are different in two significant respects from those proposed in the Letter of Intent insofar as San Diego is concerned. First, the standard of what constituted a "significantly viewed" signal was altered so that, instead of the five signals reflected in the above-mentioned chart, only two signals are now listed as significantly viewed. The second change between the Letter of Intent and the final rules was the inclusion of syndicated program exclusivity protections for local television stations. In view of these changes, we specifically mentioned in adopting the Rules that we were no longer singling out particular markets where special relief might be appropriate. To the contrary, we said "We are leaving unusual situations to petition for special relief, but there must be substantial showing to warrant deviation from the 'go, no-go' concept of the rules." [29]

48. In view of this history and our own specific statement in adopting the Rules, we cannot now consider the asterisk appended to the San Diego market in the Letter of Intent to be grounds for now granting KFMB's special relief request. Whether special relief is appropriate must depend on the showing made by the party seeking that relief.

49. KFMB's second ground for requesting special treatment without any showing of injury to the public is bottomed on our earlier San Diego market CATV hearing decision.[30] We find this argument equally unpersuasive. First, it should be noted that the decision in that proceeding was made under a different set of circumstances and under a different set of rules than now exist. In that proceeding the general assumption was made that the principal function of the cable television systems involved would be the distribution of television broadcast signals. We have since that time concluded that cable television has an important role to play in making television channels available for the distribution of diverse types of nonbroadcast programming. Our objectives in this area are reflected in the channel capacity, two-way capacity, origination, and access requirements as well as in our franchise standards. While these new public benefits that we expect cable television to provide would not necessarily have altered our findings in

[29] *Cable Television Report and Order*, 36 FCC 2d 141, 187 (1972). See also *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, fn. 40 (1972), wherein we declined to reconsider the Rules and specifically "asterisk" particular markets for special treatment.

[30] This decision appears at 13 FCC 2d 478 (1968).

the earlier proceeding they are certainly factors which must now be taken into account in balancing the risks of cable expansion against possible impairment of over-the-air broadcast service. For this, if for no other reason, the findings of the earlier proceeding standing alone do not support KFMB's petition.[31]

50. More important, however, is the fact that the signal carriage now proposed differs significantly from that ruled upon earlier. In the earlier hearing proceeding, San Diego area cable television systems were carrying more signals from Los Angeles than the Rules now permit or any of the applicants is proposing. In addition to the signals that the applicants herein generally propose the cable systems in the hearing were also carrying KNXT, KABC–TV and KHJ from Los Angeles. Claims that the earlier decision is in effect *res judicata* cannot be accepted because the same factual situation is not involved.[32]

51. Finally, and most critical to KFMB's argument, is the Commission's finding in the earlier proceeding that ". . . based on this record, no action restricting CATV growth with Los Angeles signals would be warranted if the matter were considered solely in terms of impact on the network-affiliated VHF stations in San Diego."[33] In light of this earlier finding reached at the conclusion of a full hearing proceeding that involved a greater amount of Los Angeles signal carriage than is proposed by any of the present applicants, we cannot now conclude that KFMB is in need of the special relief requested.

52. Although, for the reasons mentioned above, we cannot accept the basis upon which KFMB has sought special treatment for this market, we believe it may help to shed light on the KCST petition to more fully discuss the five principal points raised in KFMB's petition. These are:

(1) that the signals found by the Commission to be significantly viewed in San Diego County in Section 76.54(a) of the Rules do not in fact meet the definition of significantly viewed signals when viewing information from the northern part of the county is excluded from the analysis;

(2) that the signal of KNBC only meets the significant viewing test because the survey information relied upon was rounded to the nearest whole number;

(3) that, in comparison with other markets, the rules permit cable television systems in the San Diego market to carry a disproportionate number of out-of-market television broadcast signals;

(4) that the syndicated program exclusivity rules provide little protection to stations in San Diego; and

(5) that none of the applicants needs the additional Los Angeles signals permitted by the Rules in order to underwrite the provision of non-broadcast services.

53. The first two points concern the extent to which the signals of KNBC and KCOP are viewed in San Diego County and in the cable

[31] It should also be noted that in adopting the Rules, specific consideration was given to the question of whether the new Rules should apply in situations such as San Diego that had been subject to limiting orders. We said at paragraph 107 of the *Cable Television Report and Order*, 36 FCC 2d 185 (1972), "If carriage of signals has been limited by Commission order to a discrete area of a community, any extension of service outside the discrete area will be subject to the new carriage rules." Language to this effect also appears in Section 76.65 of the Rules. As to the general effect of Commission rule changes on the Midwest Television decision, see *Midwest Television, Inc.*, 426 F. 2d 1222 (D.C. Cir., 1970), wherein the court indicates that changes in the Commission program origination Rules superseded restrictions imposed in the hearing decision.

[32] The law and the parties are also different in significant respects.

[33] *Midwest Television, Inc.*, 13 FCC 2d 478, 492 (1968).

system communities involved. In response, all of the cable system applicants urge that the signal carriage they have proposed is in full compliance with the Rules and that the Commission in adopting these Rules specifically considered and rejected arguments concerning use of ARB survey information similar to those now presented by KFMB. They point out that the Rules require parties submitting additional audience survey information to notify other interested parties that new information is being gathered, which KFMB failed to do.[34] And it is urged that KFMB's division of the county was made on a highly arbitrary basis for the purpose of obtaining the desired result.

54. Southwestern Cable points out that by using the same procedure as KFMB, but limiting the scope of the survey to its franchise area, the data again reverses itself and shows at least KCOP to be significantly viewed. With respect to KNBC, Southwestern indicates that many of its existing subscribers have switches that permit off-the-air viewing of KNBC and that had these viewers been included in the survey the result might have shown greater viewing of KNBC. It requests the opportunity to take such a survey if the Commission is inclined to accept the KFMB data showing the signal as not significantly viewed in the community.

55. Relating to the same point, the reply pleading filed on behalf of Penasquitos Antenna System and of the other applicants proposing the same service contains maps prepared by a specialist in the installation of television antennas that purports to show those areas of the San Diego market where there is viewable off-the-air reception of Los Angeles television signals. The areas shown as receiving Los Angeles signals are extensive and widely scattered and include, for example, the City of Coronado, Imperial Beach and portions of National City in the southern part of the county.[35]

56. Finally, a joint exhibit prepared for Mission Cable TV and Southwestern Cable makes the point that the KFMB data, like all survey information, represents only a probability sample and not absolute viewing levels.[36] The exhibit concludes that the KFMB data is sufficiently close to the significant viewing levels specified in the Rules that there is no statistical justification for saying that the results obtained in this special tabulation "are significantly different in the statistical sense from the standards set by the Commission." In other words, the KFMB data may accurately reflect the viewing habits of those surveyed but may not accurately reflect the habits of the entire population whose viewing KFMB is trying to predict. Because the

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[34] The cable applicants have reference here to Section 76.54(c) of the Rules, which states: "Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community is located, in whole or in part, and on all cable systems, franchisees, and franchise applicants in the cable community at least thirty (30) days prior to the initial survey period. Such notice shall include the name of the survey organization and a description of the procedures to be used. Objections to survey organizations or procedures shall be served on the party sponsoring the survey within twenty (20) days after receipt of such notice."

[35] An attached affidavit indicates that maps were prepared under the direction of Mr. Wayne McKenna, an installer of "over 50,000 roof-top antennas throughout San Diego county." Apparently because not prepared by an engineer, KFMB and KCST, reject this study out of hand and without rebuttal. Even though not prepared by an engineer, we cannot agree that testimony of this type from a person directly involved in the installation of television antennas is valueless.

[36] This joint exhibit was prepared by Ernest H. Clay, Vice President of Frazier, Gross & Company, a Washington, D.C. consulting firm.

whole population has not been surveyed, the information obtained from those who were surveyed can do no more than show a range within which it is likely that the actual viewing of the total populace falls. This range, according to the Mission and Southwestern exhibit, is broad enough so that there is no statistically significant basis for saying there is any difference between the KFMB figures and the significant viewing levels specified in the Rules.[37]

57. The KFMB arguments and accompanying data raise again questions first considered by the Commission when the existing significant viewing test was incorporated into the Rules. At the time the Rules were adopted an alternative available to the Commission was simply to specify the levels of viewing considered to be significant and leave proof as to particular signals meeting that test with the private parties concerned. This alternative was rejected on the grounds that the proliferation of surveys and countersurveys would lend uncertainty to the regulatory process, impose burdensome and needless expense on the parties involved, and add little of decisional significance to the regulatory process. Instead, the Commission purchased from the American Research Bureau the results of county-by-county surveys of television viewing in all counties in the United States. Based on this survey information, a list of signals shown to meet the significant viewing test was incorporated, by reference, into the Rules. At the time the decision to follow this course was made the Commission specifically considered the question of whether rounding off survey data was appropriate, whether the American Research Bureau information used was sufficiently reliable to base the Rule on, and whether county-wide data was too gross to accurately reflect viewing patterns in communities within counties. At that time we stated: [38]

> Because this data is provided on a county-wide basis only, we recognize that it may not account for variations in viewing levels among communities within the county. There may be other drawbacks in using these surveys, such as rounding of percentages and sampling errors. We nevertheless propose to accept this county-wide information to establish viewing levels for signals in all communities within these counties. In doing so, we note that survey information of this type is generally used by the television industry without differentiating among communities within counties, and that it gives a usable indication of viewing. But the most important consideration in our decision to accept these figures as conclusive is the strong desirability of certainty, both from a cable and a broadcast point of view.[47] Otherwise, rather than permitting cable to get moving, we believe there would be controversy in virtually every case.

[47] To avoid disruption of viewing and to promote the needed certainty, we stress that the signals specified in the 1971 sweeps are not subject to deletion on the basis of some special showing or later survey.

58. Following adoption of the Rules, reconsideration petitions again raised questions about the use of the county-wide survey information obtained from ARB. We responded as follows: [39]

> In the *Cable Television Report and Order*, Paragraph 95, we acknowledged that county-wide data might "not account for viewing levels among communities within the county" and that the survey data might have other drawbacks "such

[37] More precisely, the exhibit purports to show that the significant viewing levels specified in the Rules are within the 95% confidence limits of the KFMB data. Neither KFMB nor KCST contradicted this conclusion. KCST, in fact, used the same figures reported in the Clay exhibit to make a similar point in a different context.

[38] 36 FCC 2d 141, 175 (1972).

[39] 36 FCC 2d 326, 345 (1972).

as rounding of percentages and sampling errors." We nevertheless determined that these disadvantages were outweighed by the desirability of certainty and were not of sufficient magnitude to preclude use of the data to cure a signal carriage problem where an uncertain standard and the possibility of protracted hearings had created years of uncertainty for both broadcasters and cable operators. The course petitioners ask us to take would completely defeat our goal of providing certainty, with no significant public benefits. In addition to the desirability of certainty there are a number of other factors that should be noted in considering the desirability and equity of the rule adopted. Initially, as we noted in the *Report and Order*, Paragraph 85, data of the type used here has been commonly used by advertisers and broadcasters without the fine distinctions between communities within counties which it is here suggested that we make. In the course of filing comments and economic studies in this proceeding, county-wide data obtained from the American Research Bureau was frequently used. And, when consideration was given by the Commission to a rule of this type, and viewing levels were selected, county-wide data was again used and consideration was given to patterns of carriage that would develop from the various tests of viewing under consideration.[12] Thus, in developing the rule, judgments as to what level of viewing is appropriate under the rule, what proof will be accepted as showing compliance with the rule, and as to impact on broadcast service have become intertwined. It would not, therefore, be appropriate to reconsider the standard for showing compliance without also reconsidering the levels that have been established. We see no reason to do that. The effort to more finely tune the information we have initially used to establish viewing levels through a process of survey and counter survey would, we believe, lead to continuing and pointless disputes about questions more subtle than the whole of our regulatory program is designed to deal with. As noted in the *Report and Order*, Paragraph 84, the significant viewing levels adopted could reasonably have been drawn at several points. Recognizing that the selection was at best a choice among reasonable alternatives, we do not believe that there would be any point now in encouraging quibbles over fractions of percentages if a method is available for establishing a clear dividing line. The rule adopted establishes such a line and we see no public interest reason for altering the rule and adopting a procedure that would result in extended controversy and would not produce results of any greater decisional significance.

[12] The final levels selected were conservative. As our deliberations in this proceeding progressed a number of alternative resolutions to the overlapping market (or footnote 69) problem were considered. Thus, use of 60 mile zones, Grade B and Grade A contours were considered. Later the significant viewing concept was developed and was successfully altered from a test involving share or net weekly circulation to share and net weekly circulation and finally, after the consensus agreement, the test for independent stations was changed from a one percent to a two percent share. At each tightening of the standard we looked at the resulting carriage patterns in the major markets.

59. To summarize, in adopting the Rules we recognized that there were certain imperfections in the audience viewing statistics relied on. These imperfections, however, were not felt to be of sufficient magnitude to preclude use of the data when weighed against: 1) the value of certainty in the Rules, 2) the lack of value minor deviations from the standard would have in shedding new light on the quality of broadcast service the area in question would continue to receive, 3) the relative significance further refinement in the data would have when compared with overall defects in the surveying art, 4) the fact that survey information of the same type used by the Commission is commonly used by the television industry without further refinement, and 5) the costs, in time and money, to applicants, television broadcasters, and to the regulatory process in attempting to obtain more precise data. It should also be remembered in this context that, coincident with our decision to use this statistical data base, we moved to a

more restrictive viewing test than had previously been under discussion.[40]

60. The KFMB petition with its supporting data does not convince us that our original decision in this respect was incorrect. Nor, do we feel it appropriate to deviate from it in this particular instance since there has been no persuasive showing that the deletion of the two signals involved will substantially impair the ability of local television stations to continue to serve the public in the area.

61. As Southwestern's further recapitulation of the data points out, we would not be justified in assuming that the KFMB data accurately reflects viewing even within the KFMB defined "Central Area." [41] And as Southwestern's argument concerning viewing of KNBC in its franchise area makes clear, acceptance of the KFMB data would not end the process, but would rather raise a host of additional conflicting contentions concerning the surveying process itself. For example, the way would be open for applicants to respond with a contention often heard elsewhere that the surveying process is biased against independent television stations or against those less frequently viewed. Parties in opposition might then have urged in rebuttal that the survey periods were not typical or that some survey organization other than ARB ought to have been used. Applicants might then have urged as surrebuttal that a telephone coincidental or a meter survey rather than a diary survey should have been used. Rather than take the first step in this process, which is really a sidelight to the question of whether there will be impact on television service to the public, we think that question should be approached directly.

62. We find in this instance that the signal carriage proposed complies with the Rules, that KFMB's recomputed data suggests at best minimal deviation from the significant viewing test in an area other than that specified in the Rules, that the KFMB data cannot be specifically related to viewing in any particular cable community, and that there has been no attempt to show that reliance on the Rule as it exists can be related to any adverse consequence to the television viewing public in the area.

63. KFMB's third point is an attempt to show, by comparison with other television markets, that the Rules operate unfairly in the case of San Diego. Reduced to its bare essentials, this is simply another form of arguing that the signals listed in the Rules as significantly viewed are not in fact significantly viewed. As we noted in adopting the Rules, the significant viewing test was developed in an effort to draw a line between those signals considered local and those considered distant. The KFMB market comparison, by assuming that none of the Los Angeles signals is local, predictably shows that more distant signals are being proposed than the Rules would ordinarily permit. This con-

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[40] See *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order, supra*, at footnote 12, page 346.

[41] There is even some doubt as to whether the ARB data presented by KFMB corresponds to its own designated "Central Area." The affidavit of Robert L. Myers, explaining KFMB's instructions to ARB, indicates that diaries from the sub-regional areas known as Jamul, Alpine, and Ramona were to be excluded "because they lie principally beyond the 35-mile zone of the San Diego market." The ARB surveyed "Central Area" does not show the zip codes of Jamul, Alpine, and Ramona to have been excluded. It should also be remembered that the "Central Area" does not purport to include San Dieguito, Lomas Santa Fe, or Village Park areas. See footnote 7, *supra*.

clusion is inherent in the structure of the comparison. The Rules were drawn with full knowledge of the difference in the number of signals eligible for carriage in the various markets and opportunity was provided for special relief upon a persuasive showing of station impact that would impair the discharge of public service responsibilities. No such showing has been made in this case.

64. With respect to KFMB's fourth point, concerning the extent of exclusivity protection it receives, we find nothing in the KFMB petition (or in that of KCST which makes a similar argument) to suggest that the syndicated program exclusivity Rules provide less protection to San Diego stations than they do generally. These arguments appear to be directed more to the wisdom of the Rules adopted than to their particular application in the San Diego market.

65. We find equally unpersuasive KFMB's largely unsupported assertions that cable television in the San Diego market is well able to prosper and provide non-broadcast services to the public even if carriage of Los Angeles signals is not permitted. The experience of the systems in Rancho de los Penasquitos, Mira Mesa, South Bay Terraces, University City and Tierrasanta would seem to counter this contention. These applicants, in operation without carriage of Los Angeles television signals, indicate that approximately 42% of their subscribers have either terminated their subscription or refused to pay for the service as a result of the systems' failure to carry Los Angeles signals. We have no reason to expect that the experience of the other applicants would be different. It is, in any case, apparent that the lack of Los Angeles signals will substantially reduce cable television subscriptions and consequently the potential audience for innovative programming and possibly clientele for other non-broadcast services as well.

66. We turn next to KCST's pleading, which may be briefly summarized as follows:

pp. 1–3:	contain the caption and a recitation of the signal carriage proposed in 15 of the applications.
pp. 4–7:	contain a "preliminary statement" in which the market is briefly described, the Commission's proceeding in Docket 16786 is alluded to, and some policy and factual considerations are raised. It is said that the market is not typical of those in the 51st through 100 markets, the Commission's "assumption" that carriage of two distant signals will not result in unacceptable impact on local stations is doubted, the "UHF handicap" in the market is said to be disappearing, and the program exclusivity rules are said not to be effective.
pp. 7–8:	The status of existing television stations in the market and of the construction permit for channel 51 is recited.
pp. 9–12:	The history of the activation of a station on San Diego channel 39 is detailed from June 1964, when a construction permit was granted to San Diego Telecasters, through the assignment of that permit to Western Telecasters, Inc. Some indication is given of the improvements Western Telecasters has made in the station and the manner in which it has programmed in the public interest.
pp. 13–16:	Some history of the Commission's cable television regulation is given with particular stress on the ***Second Report and Order in Docket 15971*** in which the rules in effect immediately preceding the present rules were adopted.

pp. 16–20: The Commission proceeding and decision in the earlier San Diego case (Docket 16786) is reviewed.

pp. 20–23: The *Cable Television Report and Order* is discussed, and it is argued that the Commission's finding in adopting the rules that they would be "acceptable in terms of impact on broadcasting" is an assumption "that is nowhere based on established fact."

pp. 23–24: The Commission's assumptions about the "acceptable impact" of distant signal carriage are disputed.

pp. 25–26: Based on the Commission's statements in *Midwest Television, Inc.*, on unobjected to evidence in Docket 18606, and because of increased transmitter power, it is said that KCST's signal is, "from a reception standpoint, equal to and superior in some respects to the VHF signals in the market."

pp. 27–29: ARB surveys from March, 1968 to March, 1972 are said to indicate that UHF television set penetration has grown from 64% to 89%. A tabulation of ARB survey information is provided showing that in non-CATV homes KCST had a 5.0 share of viewing hours, whereas in cable television homes carrying seven signals from Los Angeles it had a 3.9 share of viewing hours.

pp. 30–32: Reference is made to the conclusions of a study commissioned by KCST to evaluate the effect on KCST of CATV import of numerous Los Angeles stations throughout the San Diego market. (This evaluation, attached as an appendix to the KCST pleading, is discussed more fully below.)

pp. 32–33: Stating that San Diego does not fit the "stereotype" because it is a second-50 market that has an independent television station, the adequacy of the program exclusivity rules to protect KCST is questioned. It is said KCST would receive no protection against significantly viewed signals, no protection on "grandfathered" CATV systems, would receive protection against Los Angeles prime time broadcasts only if it broadcast the same programs in prime time, would receive no protection against programs sold first to Los Angeles stations and first broadcast there, and that blacked out programs could be replaced with other programs.

pp. 33–35: Concludes that the public interest would not be served by cable television operations in the market carrying distant signals.

66. Attached to the KCST pleading is an economic study entitled "Evaluation of Impact of Distant-Signal Carriage by CATV Systems in San Diego Market on Prospects for Station KCST." [42] The findings of this study may be summarized as follows:

1. ". . . neither KMEX–TV nor KCET nor XEWT–TV can expect appreciable audiences among CATV subscribers who also receive both local signals and the other distant signals listed . . . it seems appropriate to confine the impact analysis essentially to the potential introduction into additional San Diego market homes of commercial stations KNBC, KCOP, KTLA, and KTTV.

2. "If cable systems . . . had during this past year been bringing one or more of the proposed Los Angeles signals into San Diego, the net impact on the current situation of KCST would have been essentially neutral. The gain from CATV carriage in overcoming problems of shortfall in UHF penetration and of 'UHF handicap' would have been approximately balanced by the additional fragmentation."

3. On a constant dollar basis KCST revenue levels would reach the break-even point in 1976–77 season even if there were 81% CATV penetration carrying KNBC, KTLA–TV, KTTV–TV, and KCOP–TV. The prediction, however, is followed by the following statement:

[42] The Study was prepared by Leonard L. Fischman, President of Economic Associates, Inc.

"In practice, however, some expenses may be expected to increase, in response to, or as a prerequisite to, the projected increases in revenues. Specifically:

— Program expenses would presumably increase by about 28 percent in order to support the expansion from 82 hours to 105 hours weekly, or from $660,000 to about $840,000.

— Selling expense might have to double to support the increased time sales, or from $230,000 to about $460,000.[1]

Allowing for other differences that would be needed to support the increased scale of operations and revenue, perhaps $500,000 in additional expenses would be unavoidable. If so, KCST would, under the no-distant-signal-extension hypothesis, still fall short of breaking even by 1976–77, but would be well on its way toward doing so.[2]"

In addition to the above and the next footnotes hedging estimates based on KCST's expense predictions, the report later indicates that "it may still be true that KCST's expenses are on the high side of typical operating experience.[3] Their success in lowering expenses between 1970 and 1971 tends to lend support to this proposition.

This latter footnote refers to the fact that profit from KCST's use of its studio and production equipment for non-broadcast program production (principally for the ABC network) which is included in the station's annual financial report to the Commission has been excluded from this analysis of the station's profitability, apparently on the theory that the $239,000 in revenues from this source is unrelated to KCST's broadcast activity.

4. "If Channel 51 were to be activated, its 1976–77 revenues would run some $400,000 below those of KCST. Its projected audience level of 14,000 with four distant signals would most likely be insufficient to break it even."

5. "Both with and without new CATV carriage of distant signals, KCST's [1976–77 audience as a network affiliate] would be high enough to keep it profitable." Depending on the amount of cable penetration it would be making up to $400,000 less than it would in the absence of cable.

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[1] This is probably an overestimate, since the greater share of revenue increase would be from national spot sales, which involve commissions but little of the direct selling expense that accompanies local sales. That portion of the revenue increase that comes from expanding population in the San Diego area should, in any case, be "pure gravy," and is therefore not counted at all in the expense estimate.

[2] It is of course possible that the organization might manage to reduce or hold down expenses, thus counteracting the tendency toward increase in response to higher operating levels. It did, in fact, manage to decrease its total expenses between calendar 1970 and calendar 1971, even as revenues were increasing markedly.

[3] It may also be that we have overstated KCST's true broadcast expenses by making insufficient adjustment for those of KCST's expenses which are attributable to outside production activity."

67. The cable applicants have made various response to the KCST petition and economic study. In general, they press the point that their applications propose service in full compliance with the Rules and that the heavy burden on parties seeking special relief has not been met. Each quotes the following language from paragraph 112 of the *Cable Television Report and Order:*

Absent special situations or showings, requests consistent with our rules will receive prompt certification. The rules will operate on a "go, no-go" basis—i.e., the carriage rules reflect our determination of what is, at this time, in the public interest with respect to cable carriage of local and distant signals. We will, of course, consider objections to signal carriage applications and have retained special relief rules, but those seeking signal carriage restrictions on otherwise permitted signals have a substantial burden. Before restrictions are imposed in such cases, there will have to be a clear showing that the proposed service is not consistent with the orderly integration of cable television service into the national communications structure and that the results would be inimical to the public interest. We have during the course of this proceeding fully considered the question of impact on local television service and we do not expect to re-evaluate that general question in individual cases.

68. Although some of the same points appear in other pleadings, the principal attack on the KCST petition and the attached study is found in a critique authored by Ernest H. Clay that is attached to both the Mission Cable TV and Southwestern Cable reply pleadings. Four principal points are made that are intended either to confirm or refute the findings of the Fischman study. These points are:

(1) that KCST, if it obtains an affiliation agreement with the American Broadcasting Company, will be a profitable station even in the face of extensive cable television carriage of the Los Angeles signals proposed,

(2) that data from the five most recent ARB reports show no significant difference in the audience rating of KCST in CATV homes and in non-CATV homes,

(3) that KCST, operating as an independent television station, will face continuing economic difficulties that are not associated with the development of cable television and that these difficulties will continue whether or not cable television carriage of Los Angeles television signals is permitted,

(4) that activation of Channel 51 as an independent station is a dubious proposition regardless of the assumptions made concerning cable television development in the market.

69. Although there is strong disagreement as to the particular assumption relied upon, we find no substantial area of difference between the conclusions of the Fischman and Clay studies on the first two of these points.[43] It is not disputed that KCST, operating as a 1976–77 network affiliate will be profitable even in the face of 80% cable penetration carrying the proposed signals and it is agreed that, under present day conditions, cable carriage of the KCST signal overcomes, at least to some extent, the handicap KCST is under as a result of broadcasting on a UHF rather than a VHF channel. Concerning the extent to which the UHF handicap is overcome, Fischman concludes that expansion of cable television as proposed would have essentially a neutral impact on KCST if presently in existence, but within five years would cause a significant reduction in annual revenues from the level which would have been achieved if cable had expanded at the same rate without carrying the proposed Los Angeles signals. Clay concludes that the evidence indicates no statistically significant difference in the rating attained by KCST in CATV and non-CATV homes even when seven Los Angeles signals are carried.

70. With respect to the remaining two points, the issue is more squarely drawn—Fischman optimistic about the economic prospects of KCST and a station on channel 51 if cable television carriage of Los Angeles signals is not permitted; Clay completely discounting the likelihood of a station being activated on channel 51 as an independent commercial station and attributing KCST's prospects for success or failure to factors essentially unrelated to the growth of cable television service in the market.

71. KCST's special relief petition raises directly the question of what effect grant of the captioned certificate of compliance applications will have on television service to the public in the San Diego area. As we have indicated above, the service proposed in these applications is with two exceptions in full compliance with the Commission's

[43] Among the subsidiary points debated are the likely extent of cable television penetration, whether subscription to cable television results in a net increase in television viewing, and whether it is more appropriate to base predictions on the most recent ARB information or on an average of a number of ARB reports.

Rules.[44] In these circumstances there is a substantial burden of proof imposed on a party seeking the imposition of additional and extraordinary conditions or restrictions.[45] The standard is not whether there will be a loss of audience or advertising revenue to a television station but whether failure to grant the requested relief would result in a net loss of television service to the public.[46]

72. In this instance, KCST has requested a total denial of the subject applications. We find no reason to take such action, for the rationale of the KCST petition is directed principally to carriage of the four Los Angeles VHF commercial stations.[47] And, even insofar as these signals are concerned we believe KCST's request for relief goes beyond what its argument will support even if we accept the facts to be those most beneficial to the KCST point of view. This would appear to be the case because, although there is issue as to the extent, it is not disputed that there is considerable off-the-air viewing of Los Angeles television broadcast signals in the San Diego area. The audience survey data submitted by KCST, for example, indicates that 14.2% of the off-the-air viewing within the San Diego specified zone is directed to Los Angeles stations. Because of this existing over-the-air viewing of Los Angeles stations we are unable to conclude that for every Los Angeles signal we approve for cable television carriage there will be a corresponding loss of audience to San Diego stations. In fact, KCST submitted information concerning viewing of Los Angeles stations by cable subscribers on the grandfathered portions of existing systems suggests that in cable homes the two significantly viewed stations (KNBC and KCOP–TV) plus either of the two others proposed, receive approximately the same share of viewing as do the seven Los Angeles commercial VHF stations in non-cable homes.[48] These figures may not be directly transferable to new cable systems because of the difference in the total number of signals carried and because of the obligations on these new systems to comply with the syndicated program exclusivity rules. We believe, however, that they are sufficiently representative to permit us to conclude without question that authorization of at least three of the four signals requested would not change the patterns of viewing in the San Diego area to any extent sufficient to result in a decrease in the ability of

[44] The only exceptions involve the San Dieguito Cable TV applications. See paragraph 34, *supra*.

[45] *Cable Television Report and Order*, *supra*, para. 112.

[46] See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Carroll Broadcasting Co. v. FCC*, 258 F. 2d 440 (D.C. Cir. 1958).

[47] Concerning the noncommercial educational and non-English language stations proposed for carriage, the KCST-submitted Fischman study finds no likelihood that they will receive "appreciable audiences among CATV subscribers".

[48] The following table shows the KCST submitted viewing shares in cable homes of the four Los Angeles signals requested as well as an approximation of the expected share these stations might receive in cable homes in the absence of the other Los Angeles signals.

Station	Share	Expected share
KNBC	2.3	2.6
KCOP–TV	3.5	4.0
KTTV–TV	6.5	7.5
KTLA–TV	4.4	5.1

KCST or any other station in the market to continue to provide service to the public.[49]

73. With respect to addition of the fourth signal, it appears that an element of competition would be added to stations in San Diego beyond that already present over-the-air. The question then becomes whether this additional competition can be sustained by stations in the market or whether it would result in a loss of audience that would ultimately be translated into a loss of service to the public.

74. As presented in the conclusions of the Fischman study, the answer to this question depends to a great extent on whether KCST is successful in obtaining a network affiliation.[50] According to the Fischman study, cable carriage of Los Angeles signals in the present market environment would have an essentially neutral impact on KCST without regard to its affiliation with a national television network. In a 1976–77 environment, the study predicts that KCST would not be profitable as an independent station faced with the proposed cable service but would be profitable if affiliated with a national television network.

75. Based on KCST's own study and making the assumption that it will obtain a network affiliation, we are unable to conclude that it has made a case warranting the grant of special relief even against the fourth signal requested. As the Commission and the Courts have indicated in the past, our concern in this area of regulation is not with loss of audience or advertising revenues, unless that in turn leads to a net loss of television service to the public. Although the Fischman study predicts that cable development will result in a loss of potential revenue to KCST, it still indicates a profitable future for KCST as a network affiliate. There has been no attempt, and indeed it would be difficult to make the attempt in view of the Fischman findings, to show that authorization of the proposed cable operations would result in a loss of television service to the public. Thus, under the assumption that KCST will obtain an affiliation, we find that KCST has failed to make the substantial showing required to support the special relief requested.

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[49] In judging th KCST petition we have relied principally on the survey data submitted by KCST. This information is a special American Research Bureau tabulation of data from its February/March 1972 survey for the zip code area within the San Diego 35 mile zone. We have also reviewed alternative formulations of the viewing data contained in other pleadings of both the applicants and KFMB. Depending on the survey used and the particular area segregated for consideration, there is greater or lesser off-the-air viewing of Los Angeles signals. We are unable to conclude either that any of the alternative formulations are preferable to that of KCST or that, if used, our conclusion concerning the likely impact of carriage of three of the four signals would be different. Even using the figures most adverse to the cable applicants, assuming a high degree of cable penetration and a reduction in the UHF handicap, carriage of these stations would result in a minimal amount of additional competition to each of the San Diego stations.

[50] The American Broadcasting Company currently delivers its network television programming to Mexican television station XETV, Channel 6, Tijuana, Mexico, across the Mexican-American border from San Diego. In response to a petition filed by KCST and after a full evidentiary hearing the Commission concluded that ABC's authority under Section 325(b) of the Communications Act to deliver this network programming to XETV should not be renewed. *American Broadcasting Companies, Inc.*, 35 FCC 2d 1 (1972). This decision was affirmed on appeal. *American Broadcasting Co.* v. *FCC*, Case No. 72–1612 (D.C. Cir., Dec. 27, 1972). The Commission has approved an agreement between ABC, XETV and KCST under the terms of which KCST will become a partial affiliate on June 1, 1973, and a full affiliate on July 1, 1973. *American Broadcasting Companies, Inc.*, FCC 72–227 FCC 2d (1972). Additional pleadings concerning this matter are, however, still pending with the Commission.

76. Conclusions as to KCST's future in the absence of an affiliation agreement are more difficult. We note that the conclusions of the opposing parties on this point are disputed and are not unequivocal in outcome. Because we anticipate that KCST will soon become a network affiliate, we find it unnecessary at this time to pass on the question of whether special relief would be justified in the circumstance that KCST continues operation as an independent station. We believe the better course to follow at this time is to assume that KCST will obtain an affiliation and to condition our action herein to take effect, insofar as carriage of the fourth Los Angeles signal is concerned, at the time KCST becomes a network affiliate. If within the near future KCST does not obtain that affiliation, we will then rule on KCST's petition under the assumption that it will continue operation as an independent television station.

77. As a further matter, KCST has also raised the question of whether special relief is justified to protect the potential for a new television station on channel 51, San Diego. We do not believe it would be appropriate to rest our decision in this matter on highly problematical speculation as to the possible activation of a station on channel 51 and possible cable impact on such a station. Insofar as as there appears to be any active interest in this channel at the present time, it is by United States International University which has proposed operation of a non-profit station with programming directed to fill what is described as a "gap between mass appeal commercial programming and the educational programming carried on San Diego's educational television station." It would not appear likely that the KCST attempted impact analysis would have application to such a station.[51]

78. In these circumstances we believe it appropriate to proceed by authorizing the captioned cable applicants to commence carriage of the two significantly viewed signals from Los Angeles as well as one of the two additional independent stations requested. We will also certify for carriage the other independent station but will condition commencement of carriage of this signal on the termination of ABC's authority under Section 325 of the Act to relay programming to channel 6 in Tijuana and on KCST's obtaining a national network affiliation.

79. Finally, we think one further condition is appropriate. The San Diego area now receives service from the ABC television network from channel 6, Tijuana. If, as appears likely, this affiliation is switched to KCST, there may be some tendency among viewers in the San Diego area to give a greater share of their viewing time to KABC–TV. Should this occur at all, it is likely to be a transitory phenomenon associated with the switch in affiliation and the adjustment of the public.

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[51] A construction permit for operation on channel 51 was granted to Jack O. Gross in 1965. The station was never constructed and, after a number of time extensions were granted, the Commission set for hearing a further time extension request and a number of other issues concerning the permittee's qualifications to be a licensee. *Gross Broadcasting, Co.*, 15 FCC 2d 76 (1968). During the course of that proceeding an attempt was made to assign the permit to United States International University. At the conclusion of the hearing the time extension request was denied and judicial appeal of that decision is pending. *Gross Broadcasting Co.*, 34 FCC 2d 780 (1972), 38 FCC 2d 56 (1972). United States International University also has pending a "Petition for Extraordinary Relief" requesting the Commission to take such action as will allow it to become the permittee of this station by assignment from Jack O. Gross. No action has as yet been taken on this petition.

If an attempt were made to show significant viewing of KABC–TV in the San Diego market, we do not believe it would be appropriate to accept such a showing on behalf of cable applicants during this transition period. No such showing from these applicants will be accepted prior to March 31, 1977. If such showing is later submitted, we will impose on the cable applicants the burden of demonstrating that the change in viewing patterns is not simply a temporary occurrence during this period of adjustment.

Accordingly, IT IS ORDERED, That the captioned applications for certificates of compliance ARE GRANTED, except that the applications of San Dieguito Cable TV (CAC–966 and CAC–967) ARE DENIED to the extent indicated in paragraph 34 above.

IT IS FURTHER ORDERED, That grant of the captioned applications is conditioned on carriage of one of the following signals, KTTV–TV or KTLA–TV, not commencing unless and until Television Broadcast station KCST, San Diego, California has obtained a primary network affiliation with one of the three national television networks.

IT IS FURTHER ORDERED, That the "Request of the Board of Trustees, The California State University and Colleges for California State University, San Diego, California, for a Commission Order to Show Cause Why a Cease and Desist Order Should Not Be Issued (Section 1.91 and 76.7 of the FCC Rules)" filed in response to the Televents of Coronado, Inc., application (CAC–307) IS DENIED.

IT IS FURTHER ORDERED, That the "Request of the Board of Trustees, The California State University and Colleges for California State University and Colleges for San Diego State College, San Diego, California, For a Commission Order to Show Cause Why a Cease and Desist Order Should Not Be Issued (Section 1.91 and 76.7 of the FCC Rules)." filed in response to the Mission Cable TV, Inc., applications (CAC–17–23) IS DENIED to the extent reflected in paragraph 39, above, and action on the remainder of that pleading is otherwise reserved for decision apart from this proceeding.

IT IS FURTHER ORDERED, That the "Petition for Special Relief and Objection to Applications For Certificates of Compliance" filed by Midwest Television, Inc., in response to CAC's 17–23, 124–126, 135–137, 159, and 307 IS DENIED.

IT IS FURTHER ORDERED, That the "Objection to Applications for Certificates of Compliance and Petition for Special Relief" filed by Western Telecasters, Inc., in response to CAC's 17–23, 124–126, 135–137, 159 and 307 IS DENIED.

IT IS FURTHER ORDERED, That the "Objection to Application for Certificate of Compliance and Petition for Special Relief" (CSR–218, 265, 266) filed by Western Telecasters, Inc., in response to CAC's 784, 966, and 967 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

109–037—73——6

F.C.C. 73-404

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

OMEGA SERVICES, INC., CHICAGO, ILL.
Request for Inspection of Commercial and Amateur Operator License Examinaton Application Files

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1973; Released April 19, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT; COMMISSIONER JOHNSON DISSENTING.

1. The Commission has under consideration: (a) the ruling on a request for inspection of records, entered in this matter by the Executive Director on January 29, 1973; (b) an application for review of the ruling, filed by Omega Services, Inc. on February 28, 1973.

2. On December 6, 1972, Omega Services, Inc., Chicago, Illinois (Omega) filed a request with the Commission's Executive Director requesting permission to inspect certain records in the Commission's Chicago District field office, to wit: commercial and amateur operator license application files. Omega operates a commercial vocational training school which teaches electronics and states that its purpose in inspecting these files would be to determine the names and addresses of those applicants who have failed FCC license examinations in order that Omega could contact them to offer its training courses.

3. On January 29, 1973, the Executive Director denied Omega's request primarily on the basis that disclosure of the information contained in the application files, apart from the names and addresses of applicants, would constitute an unwarranted invasion of personal privacy which outweighed the public's general right to access to governmental information. On February 28, 1973, Omega asked for Commission review of the Executive Director's ruling and emphasized that it had not requested any of the information in the above described files which was of a personal or private nature, but only the names and addresses of the applicants.[1]

4. The Executive Director's ruling was based on Section 0.457(f) of our Rules, 47 CFR § 0.457(f), and Section (b)(6) of the Public Information Act, 5 U.S.C. § 552(b)(6). Section 0.457(f) provides that "personnel, medical and other files whose disclosure would constitute a clearly unwarranted invasion of personal privacy" are not routinely available for public inspection. This provision tracks the

[1] Section 1.115(a) of our Rules, 47 CFR § 1.115(a), provides, in part: "Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission."

language of Section (b)(6) of the Public Information Act, 5 U.S.C. § 552(b)(6). As such, the requested records are not routinely available for inspection and they are normally not otherwise available for inspection unless a persuasive showing as to the reasons for inspection is made by the person requesting the records. In the leading case construing Section (b)(6) of the Act, the United States Court of Appeals for the District of Columbia Circuit stated that this section requires a balancing involving "protection of an individual's private affairs from unnecessary public scrutiny" and "preservation of the public's right to governmental information." [2] In weighing the policy considerations favoring disclosure and non-disclosure of this information, as required by Section 0.457 of our rules, and in balancing the competing interests involved here as set out by the court in *Getman* v. *National Labor Relations Board*, we believe that protection of the individual's right to the privacy of personal information such as his physical health or FCC examination results, clearly outweighs Omega's right to this information. We are thus compelled to decline disclosure of these records.[3]

5. Because Omega has emphasized that it is not seeking personal information, we have also investigated the possibility of devising procedures by which we could make the names and addresses of the applicants available without disclosing private, personal information which we have determined may not be disclosed. We have been unable, however, to find any reasonable method by which we could comply with such a request. The information requested by Omega is not maintained by the Commission on any list or on any separate form which does not also contain personal information concerning the applicant. Because of the manner in which these records are maintained, the necessity that they be available to Commission personnel for processing and administrative functions, and the volume involved,[4] there is simply no feasible method by which the non-personal information requested by Omega could be extracted from the forms and made available without placing a wholly unreasonable administrative burden on Commission personnel. Nothing in the Public Information Act or in our rules obligates us to compile a record that does not now exist in order to be able to satisfy a request for information, particularly when the Commission has no use for the information in such form and its compilation entails a substantial amount of work. In addition we note that

[2] *Getman* v. *NLRB*, 146 U.S. App. D.C. 209, 213n. 10 (D.C. Cir. 1971).

[3] Application forms and other records maintained by the Commission on applicants for commercial and amateur radio operator licenses include information pertaining to the applicant's character, physical health and physical defects, or FCC examination scores, all of which we consider to be private information.

[4] There are four separate forms which contain the information requested by Omega, all of which also contain information which we consider to be private. Immediately after initial processing by the Chicago office, two of these forms are forwarded to the Commission's Gettysburg, Pa. office for further processing. The other two forms, which total at least 6,000 per year are maintained at the Chicago office for six years and are filed alphabetically by year. We also note that these forms are used for other purposes including application for license renewal, separate endorsements to an existing license, duplicate or replacement licenses, and modification of an existing license. The Chicago field office does not distinguish the purposes for which an application was made when it is filed, but maintains separate files only for each type of form regardless of the purpose for which the application was made. Thus many of the records maintained in the files would not be relevant to Omega's request, although that could be determined only by reviewing each separate document maintained in the relevant files.

the increased work to compile this information would be a continuing process since the information would soon become useless if it were not frequently updated. Therefore, in view of the serious administrative burden which would be placed on Commission personnel in compiling the information requested by Omega in a form which does not contain personal information, we are compelled to also decline the request on this ground.

6. In view of the foregoing, IT IS ORDERED, that the application for review filed by the Omega Services, Inc. on February 28, 1973, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–450

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUESTS BY ABC AND NBC FOR WAIVERS OF THE PRIME TIME ACCESS RULE IN CONNECTION WITH SPORTS EVENTS IN MARCH AND APRIL 1973
(Petition for Reconsideration by National Association of Independent Television Producers (NAITP))

MEMORANDUM OPINION AND ORDER

(Adopted April 25, 1973; Released May 4, 1973)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; H. REX LEE AND HOOKS CONCURRING IN THE RESULT; COMMISSIONER ROBERT E. LEE AND JOHNSON DISSENTING.

1. The Commission here considers its decision in the above captioned matter (FCC 73–240, released March 7, 1973, 26 R.R. 2d 1278), and a "Petition for Reconsideration" with respect thereto filed on March 12, 1973, by National Association of Independent Television Producers (NAITP), an association of independent television producers which has taken a position vigorously supporting the "prime time access rule" (Section 73.658(k) of our Rules) and strict application of it. We also consider an opposition to the petition filed by National Broadcasting Company, Inc. (NBC).[1]

2. In the March 7 decision, we granted waiver of the "prime time access rule" to ABC and NBC and their affiliates in connection with various sports events occurring during March and April 1973, although some of the events covered—some of NBC's Stanley Cup hockey playoff telecasts—will last into May. The waivers granted were similar to those authorized in a number of previous actions, in situations where the event occurs in the afternoon and, on the basis scheduled, would normally end before prime time begins at 7 p.m. E.T., but, if there are weather delays or overtime, conceivably might last longer, or where the event is scheduled for a certain amount of prime time in the evening, and normally should be completed within that time but occasionally might exceed it.[2] For NBC, the waivers included three NCAA basketball playoff telecasts in March, two afternoon and one evening, and regular season and Stanley Cup hockey games, unspecified in number and occurring in both afternoon and evening. The waiver was

[1] American Broadcasting Companies, Inc. also filed a brief opposition; but the only event involved in its schedule occurred March 25, and therefore, as to it, the petition is moot.
[2] Waivers of this sort were contemplated by "footnote 35" of the Report and Order in Docket 12782, in which the rule was adopted (23 FCC 2d 382, 395).

granted on the basis that the afternoon basketball games normally would be expected to be completed within two hours 15 minutes and the afternoon hockey games within two hours 45 minutes; and that the evening contests—which involve "over-runs", if at all, only in the Mountain and Pacific time zones—would be over in two hours for basketball and 2½ hours for hockey.

3. NAITP in its petition states that it does not object to the complete carriage of sports events, but does object to the underlying assumption assertedly involved in these waivers, that the producers of access period programs, rather than the networks responsible for both the sports "overrun" and the "unaffected prime time programs", should bear the burden involved when overruns occur. It asserts that such waivers in effect condone a practice by which the networks schedule sports events "immediately before prime time", creating a situation wherein independent access-period programs, rather than later network programs, are cut from the schedule. It is said that the situation is worsened by the fact that if the overrun occurs, local stations are required to rebate advertising purchases on the access-period programs affected, which has caused considerable friction among local advertisers, stations, and the program producers or distributors. NAITP also claims that this, the latest in a series of actions which have granted a large number of waivers in these situations, is "at best . . . a perversion of the Commission's intent" in adopting both the prime time access rule and "footnote 35". It is also claimed that grant of waiver in this case is inconsistent with the Commission's desire to preserve the *status quo* pending decision concerning the prime time access rule, and not to embark on "ad hoc resolution of general problems."

4. NAITP advances various approaches which it believes preferable in that they would eliminate the "unfairness" and "harm to innocent third parties" involved. One is that the networks should re-schedule "access time" on days when such sports runovers are likely to occur, which would be chiefly Saturday and Sunday, and possibly Friday. In this way, they, who gain revenues and audience from the over-run, would bear the burden. It is also suggested that they could re-schedule the events to provide more time for their telecast and thus be sure of avoiding runover.

5. NAITP also refers to two proposals which it advanced in its comments in Docket 19622 as preferable approaches to the "sports overrun" problem. One is that there be a modified "21 hours a week" rule under which the networks could "clear" only a half-hour for access time on certain nights and present 3½ hours of network material, to be compensated for by presenting only 2½ hours of network programs on other nights of the week. They could schedule their heavy network nights for Friday, Saturday and Sunday, thus bearing the brunt of any sports overruns from the afternoon. The second is that network sports overruns be permitted, but that the networks be required to relinquish all commercial positions in the "overrun" time for the carriage of local-station commercials—with pro-rata recovery of line charges from the stations. (Thus, they would not lose from the overrun, but would not profit either). It is asserted that in the absence of adop-

tion of these suggestions, it is wholly inappropriate to grant *ad hoc* waivers, shifting the burden to stations, advertisers and syndicators to pay for network miscalculations in scheduling. In conclusion, NAITP asks either that the grant of waiver be reconsidered, or that it be conditioned on the deletion of network commercials during the overrun period, in favor of the commercials previously scheduled by the station during "access period" programs, with the networks permitted to assess the stations' *pro rata* portions of the line charges for the over-run time.

6. In opposing the petition for reconsideration, NBC urges a number of points. First, it calls attention to the small number of runovers which have occurred during the period of over a year since the rule became effective, and the small amount of time involved—for NBC, 14 occasions out of over 100 covered by waivers, the majority of only 4 minutes or less. Therefore, there is no significant impact on the revenues or potential market for independently produced new non-network material, since stations certainly cannot *plan* on runovers so as to cut down their purchases of other programming. It is also asserted that usually these programs, not presented because of a network sports runover, are rescheduled to another time. Second, it is claimed that grant of waivers in the present decision was thoroughly consistent with "footnote 35", since in normal course the events will be completed as scheduled, and also, that it is in accord with the Commission's expressed intent of preserving the *status-quo* pending decision in the over-all Docket 19622 proceeding. Third, it is claimed that the specific proposals advanced by NAITP for dealing with these situations, similar to those also urged in Docket 19622, involve significant policy and operational considerations better dealt with in that proceeding, and, in fact, are unnecessary, impractical and unworkable, as the comments filed in that proceeding show. Lastly, it is claimed that the petition is procedurally deficient, in that NAITP does not meet the requirement of Section 1.106(b) of the Rules, by showing why it could not have participated in this matter at an earlier stage, since the NBC petition dealt with in our decision was filed October 31, 1972, and in a decision of December 19, 1972, we decided earlier portions of the NBC and ABC petitions, clearly indicating that there were other requests still outstanding (FCC 72–1131, released December 19, 1972).

CONCLUSIONS

7. Upon careful consideration of the foregoing matters, we are of the view that the "Petition for Reconsideration", filed by National Association of Independent Television Producers on March 12, 1973, must be denied. Basically, our reason for this conclusion is that there is not presented any reason for deviating from the policy we have previously expressed—of preserving the *status quo* with respect to prime time access rule waivers, pending the over-all decision in Docket 19622, which is expected in the near future. This means that we will give no blanket waivers for *additional programs*—as indicated in our actions holding in abeyance waiver requests in the *Children's Television Network* and *America* cases (FCC 73–244 and FCC 73–323, released

March 20 and March 26, respectively), but will grant continuation of waivers previously authorized, either for a particular program (*Wild Kingdom*, FCC 73–296, released March 20, 1973) or, in the present case, for continuing waivers, in case they should be necessary, for coverage of sports events.

8. There are certain facts making this decision particularly appropriate here. First, there is no indication that particular harm is likely to flow to any party from continuing the previous policy; as mentioned by NBC, overruns occur only a small percentage of the time in these situations, and if it occurs it will probably be quite small in amount. While NAITP mentions the problem of adjustment among stations, local advertisers and producers when runovers occur, no specific examples are given, and, more important, neither here nor in Docket 19622 have examples been shown of how much impact occasional runovers have *on the use of, and therefore the demand and market for, independently produced new non-network programming*. This question, specifically raised in the Notice in Docket 19622 (FCC 72–957, pars. 17(b)(4) and footnote 10, and par. 36) has gone largely unanswered. Second, while NAITP advances various alternative approaches, we agree with NBC that they are more appropriate for consideration in the general proceeding. For the foregoing reasons, we conclude that the NAITP petition must be denied insofar as it seeks total or partial reversal of our action granting the waivers in question.

9. In view of the foregoing, IT IS ORDERED, That the "Petition for Reconsideration" filed on March 12, 1973, by National Association of Independent Television Producers, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 73-441

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST FOR WAIVER OF THE PRIME TIME ACCESS RULE (SECTION 73.658(k)) TO RE-DESIGNATE THE HOURS OF "PRIME TIME" FOR STATIONS IN INDIANAPOLIS, IND. DURING THE DAYLIGHT-SAVING-TIME MONTHS

MEMORANDUM OPINION AND ORDER

(Adopted April 25, 1973; Released April 30, 1973)

BY THE COMMISSION: COMMISSIONERS REID AND WILEY ABSENT.

1. The Commission here considers letter requests by the licensees of two of the three network-affiliated stations in Indianapolis, Ind. (WRTV, dated April 13, 1973, and WISH-TV, dated April 16, 1973), asking that the Commission re-designate the hours of "prime time" for the purpose of Section 73.658(k) of the Rules, for the Indianapolis market during the months when daylight saving time is in effect in most of the United States but not in Indianapolis and certain other portions of the Eastern and Mountain time zones. A similar request was granted in April 1972. The third Indianapolis station has indicated its desire for the same change.

2. The reason for this request is that since New York and most of the U.S. observe daylight saving time, network programs are moved up an hour in their time of origination. For those markets such as Indianapolis which remain on standard time, network prime-time programs originating from 8 to 11 PM New York time are actually received in these places from 7 to 10 PM local time during these months. These stations accordingly wish to change the designated prime hours to 6 to 10 PM local time. A similar change by rule is proposed in Docket 19622, the over-all prime time access rule proceeding, decision in which is expected in the next few weeks.

3. This change appears appropriate, and accordingly, we here designate the hours from 6 to 10 PM, local time, as "prime time" for the affiliated stations in the Indianapolis market. The Commission's Broadcast Bureau may take similar action with respect to other markets similarly situated (Detroit and Grand Rapids) if it is requested.

4. In view of the foregoing, IT IS ORDERED, that the hours of prime time, for the purpose of Section 73.658(k), ARE RE-DESIGNATED as 6 to 10 PM, local time, for the period starting Sunday, April 29, 1973, and ending Saturday, October 27, 1973, for stations in Indianapolis, Indiana.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-407

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of INQUIRY INTO THE PROVISIONS OF SUBPART F, RADIO AMATEUR CIVIL EMERGENCY SERVICE (RACES), IN PART 97	Docket No. 19723 RM-968, RM-1116, RM-1478, RM-2032

NOTICE OF INQUIRY

(Adopted April 18, 1973; Released April 20, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT.

1. In our Report and Order adopted today on Docket 17315, we denied a petition to expand the emission privileges for stations operating in the RACES program because of the expressed opposition to further expansion of privileges for RACES stations, among other reasons. Four other petitions for rule making have been filed requesting additional amendments to the provisions in Part 97, Subpart F, Radio Amateur Civil Emergency Service (RACES).

2. RM-968 was filed by the County of San Diego, and requests amendments permitting RACES stations to be operated by radio remote control through a control link utilizing non-amateur frequencies. Petitioner desires to use the microwave facilities of the Government Emergency Operators Centers for this purpose.

3. RM-1116 was filed by the California Disaster Office. The petition requests extensive rule changes to Subpart F, including expansion and revision of frequency allocation for RACES.

4. RM-1478 was filed by the Area "D" Civil Defense and Disaster Board, Pomona, California, and requests Section 97.193(a)(3) be amended to authorize 40F2 emission for radioteleprinter operation in the frequency bands 145.17–145.71 MHz, 146.79–147.33 MHz, and 220–225 MHz.

5. RM-2032 was filed by Murray Green, and requests amendments to rules to permit Technician Class licensees to operate in the 50.35–53.75 MHz, 145.17–145.71 MHz, and 220–225 MHz frequency bands in RACES. Petitioner also requests the frequencies 146–147 MHz be authorized for RACES with emissions ϕ.1A1, 1.1F1, 6A2, 6F2, 6A4, and 40F3.

6. As stated in Subpart F, RACES provides for amateur radio operation for civil defense purposes only, during periods of local, regional, or national civil emergencies. It is a radiocommunication service carried on by licensed amateur radio stations while operating on specifically designated segments of the regularly allocated amateur frequency bands, under the direction of authorized local, regional or

federal civil defense officials pursuant to an approved civil defense communications plan. Persons holding amateur radio operator licenses, and persons holding certain grades of commercial radio operator licenses are eligible to operate RACES stations provided they are enrolled in the Civil Defense organization as a radio operator.

7. Stations operating in RACES share the allocated frequencies with other amateur radio stations conducting non-RACES amateur radiocommunication. Inasmuch as the privileges of amateur radio operator classes (Section 97.7), do not apply to the operation of RACES stations, except for some limitations for holders of the Novice Class and Technician Class, and since non-amateur operators may operate RACES stations, appropriate safeguards are necessary to insure that non-essential RACES radiocommunication is not conducted at the expense of regular amateur radiocommunications.

8. RM–968 is concerned with the control of RACES stations by radio remote control in one particular Emergency Operations Center, San Diego, California. Due to radio interference restrictions at that particular site, the frequencies 220–225 MHz available to RACES stations for remote control cannot be used. Petitioner proposed amendments to the Rules to permit Local Government (Operational Fixed) microwave equipment to be used for the control link.

9. RM–1478 states that the authorization of 40F2 emission in the frequency bands 145.17–145.71 MHz, 146.79–147.33 MHz, and 220–225 MHz for audio frequency-shift keying in radioteleprinting will ". . . materially benefit the RACES service by allowing the use of the superior characteristics of this mode, e.g., sensitivity, noise, interference and power ratios."

10. Petitions RM–1116 and RM–2032 request expanded and revised frequency allocations for RACES stations. RM–1116 does not offer any rationale for the extensive frequency and emission authorizations requested. Additionally, petitioner proposes rules changes relating to the organizational and operational phases of the RACES program. RM–2032 claims the potential value of Technician Class licensees to support the RACES program is lost by the prohibition against such licensees obtaining RACES station authorization for operation as members of RACES. Petitioner states that:

> ". . . a large portion, if not the majority of today's FM repeater users, hold Technician Class licenses", and ". . . the utilization of FM VHF repeaters, together with mobile and portable communications equipment and dedicated Amateur Radio operators, provides an enormous reserve of emergency communications in support of local civil defense operations."

11. These petitions, like the petition denied in Docket 17315, would expand the privileges for stations and operators in the RACES program. Since the same frequencies and emissions are common both to RACES activities and to other amateur radio activities, the allocation of additional privileges to RACES could have an impact upon non-RACES activities. In light of the lack of any positive response to the proposed amendments in Docket 17315, and because of the lack of any other substantive information on the general need in the RACES program for the proposed amendments, this Notice of Inquiry is intended to elicit comments and suggestions from informed

persons and organizations familiar with RACES and the Amateur Radio Service.

12. In order to assist the Commission in making determinations in these areas, informed parties are requested to submit comments and suggestions relevant to the following:

I. Is RACES an effective means of providing needed communication services during periods of local, regional, or national emergencies?

II. Is the present licensing system for RACES stations appropriate? Should stations authorized to be operated in RACES be assigned distinctive call signs which could only be used for RACES activities?

III. What abuses, if any, of the Rules by RACES stations are commonplace? What are possible solutions to ending these abuses?

IV. Should additional or different privileges, e.g. frequencies, emissions, operators, be authorized for RACES stations? What are the most needed additional privileges? What are the consequences, to both RACES and the Amateur Radio Service in general, if RACES privileges are expanded? What are the consequences if RACES privileges are not expanded?

V. What additional safeguards, if any, are required to insure that non-essential RACES radiocommunication is not conducted to the detriment of non-RACES amateur radiocommunication?

13. This action is taken pursuant to Sections 4(i), 303, and 403 of the Communications Act of 1934, as amended. Comments must be filed on or before July 1, 1973. All relevant and timely comments will be considered.

14. In accordance with provisions of Section 1.419 of the Rules, an original and fourteen (14) copies of all comments, suggestions, pleadings, briefs, or other documents shall be furnished the Commission. Responses will be available for public inspection during regular business hours in the Commission's Broadcast and Docket Reference Room at its Headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Seretary.*

F.C.C. 73-408

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 97, SUBPART F, REGULATIONS FOR THE RADIO AMATEUR CIVIL EMERGENCY SERVICE (RACES)	Docket No. 17315 RM-964

REPORT AND ORDER

(Adopted April 18, 1973; Released April 20, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT.

1. On March 22, 1967, the Commission adopted a Notice of Proposed Rule Making in Docket 17315. The Notice proposed amendments to Subpart F, Radio Amateur Civil Emergency Service (RACES), of the Rules and Regulations for the Amateur Radio Service, Part 97. RM-964 was filed by the New York Civil Defense Commission, and requests that Sections 97.193(a)(1) and 97.195(a) be amended to provide for the use of facsimile, F4 emission, in the 1800–2000 kHz and 3500–4000 kHz amateur frequency bands. Although the time for filing comments was subsequently extended from April 28, 1967, to May 26, 1967, by Order adopted on April 27, 1967, only three comments were timely filed. Two comments oppose the proposal and the other one takes exception to the petitioner's basis for the petition. No comments were filed in support of the proposal.

2. The Notice was in response to RM-964, in which the petitioner stated a desire for a RACES radio link as a back-up capability to the primary wireline link in a system used to facilitate the collection, interpolation and dissemination of radiological fallout data gathered at approximately 3,000 monitoring stations throughout New York State. The data is transmitted by facsimile over the wireline circuits. Petitioner justified the need for the radio back-up link with the following statement:

> Since this portion of our civil defense communications system is essential to the survival of the State's eighteen (18) million populace, and since the post-attack wireline survival capability is an unknown, un-predictable link in this vital system, it is evident that a radio back-up link is necessary to ensure full post-attack radiological defense communications reliability.

3. Due to the radio coverage desired, petitioner requested amendments which would authorize facsimile emissions in the 1800–2000 kHz and 3500–4000 kHz amateur radio bands. Accordingly, our Notice proposed to amend Sections 97.193(a)(1) and 97.195(a) to provide for

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the use of 3A4 emission in the 1800–1825 kHz, 1975–2000 kHz and 3990–4000 kHz frequency bands and incorporate other related amendments. These frequencies are available on a non-exclusive basis for RACES stations which are operated under the direct supervision of civil defense officials.

4. Comments filed by the New York Telephone Company state no objection to the proposed rule making, but they request that the record be set straight with respect to paragraph 4 of the Notice which stated:

> Since the post attack wireline survival capability in New York State is an unknown, petitioner asserts it is evident that a radio back-up link is necessary to insure full post attack radiological defense communication reliability.

The New York Telephone Company believes this statement misleading and contrary to fact. They feel that the ". . . useful redundancy in the Common Carrier network in New York State gives this network a high degree of survivability."

5. Comments filed on behalf of the New York State Phone Traffic and Emergency Net stated opposition to the proposal to authorize A4 and F4 emissions in the 160 meter and 75 meter frequency bands. Respondant claims such operation would cause non-essential interference to the New York State group and other amateur traffic handling networks.

6. Comments filed by the American Radio Relay League (ARRL) stated they are unable to support the proposed amendments. ARRL requests adequate safeguards be applied so that RACES will not become a routine non-amateur communications activity. They express concern, ". . . over trends in RACES administration and operations which stray beyond the bounds of both the intent and the rules. These trends concern the use of non-amateur operators in some areas almost to the exclusion of licensed amateurs, often without the necessary authorization of the appropriate civil defense official, and use of RACES facilities for communications not authorized or contemplated by the rules."

7. The radio frequency bands proposed for facsimile emissions by RACES stations are also used extensively by non-RACES amateur radio stations. The 3990–4000 kHz segment is heavily used for radiotelephony. This is in the portion of the 75 meter band which was expanded on November 22, 1972, to help alleviate the severe overcrowded conditions. The other two segments are in the 160 meter band, which is shared on a secondary basis with the LORAN–A radionavigation system. The State in which an amateur radio station is located determines the availability of these frequencies and the power limitations. As a consequence, the full potential of the 160 meter band to the Amateur Radio Service cannot be realized. Only a few stations can operate simultaneously in this frequency band.

8. Therefore in view of (1) the lack of support for the proposal, (2) the expressed opposition to the proposal, (3) the statement of the New York Telephone Company regarding the survivability capabilities of the wireline system, and (4) the existing overcrowding and shortage of operating frequencies in the 160 meter and 75 meter bands, we are unable to find that adoption of the proposed amendments would be in the public interest convenience or necessity.

9. Accordingly, IT IS ORDERED, that the petition for rule making, RM–964, filed by the New York Civil Defense Commission, IS DENIED.

10. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-416

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of RADIO LONGMONT, INC. For Renewal of Licenses for KLMO and KLMO-FM, Longmont, Colo.	File Nos. BR-2369 BRH-1626

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1973; Released April 23, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT. COMMISSIONERS JOHNSON AND HOOKS CONCURRING IN THE RESULT.

1. The Commission has before it for consideration: (i) the above-captioned license renewal applications for Radio Stations KLMO and KLMO-FM, Longmont, Colorado, filed by Radio Longmont, Inc.; (ii) a petition to deny those applications filed by the Colorado Committee on Mass Media and the Spanish-Surnamed, Inc.; and (iii) Radio Longmont, Inc.'s opposition to that petition to deny.

2. Initially, to place this proceeding in perspective, we note that Radio Longmont, Inc. (licensee) timely filed its applications for renewal of the licenses for KLMO and KLMO-FM on January 4, 1971. On March 4, 1971, the Commission granted an extension of time to March 12, 1971, for the Colorado Committee on Mass Media and the Spanish-Surnamed, Inc. (petitioners) to file petitions to deny the renewal applications of forty-six (46) Colorado broadcast stations. 28 FCC 2d 375. Further requests for additional extensions of time to file petitions were denied by the Commission on March 17, 1971. 29 FCC 2d 11. It was stated at that time that we would continue to welcome informal objections to renewal applications, pursuant to Section 1.587 of the Commission's Rules and Regulations. On March 31, 1971, the Committee filed the petition to deny which is the subject of this proceeding against KLMO and KLMO-FM. No explanation for the delay is offered by petitioners, nor is a waiver of Section 1.580(i) of the rules requested. Accordingly, the petition to deny will be dismissed. Due to the nature of the matters raised, however, we have elected to consider the petition on its merits as an informal objection. See *WOIC, Inc.*, 39 FCC 2d 355 (1973); *Universal Communications Corp.*, 27 FCC 2d 1022 (1971).

3. Petitioners contend that the licensee failed to ascertain the needs and interests of its service area in compliance with Commission requirements as set forth in the *Primer on Ascertainment of Community Problems by Broadcast Applicants*. 27 FCC 2d 650 (1971). It is stated that Longmont, Colorado, the city of license, has a population of

23,309 and that 1,740 or seven percent of these residents are Spanish-Surnamed Americans. Petitioners complain that in ascertaining community problems the licensee only interviewed thirteen (13) community leaders, one of whom is Spanish-Surnamed. While it is admitted that the Spanish-Surnamed population was proportionately represented (one interviewee constitutes seven percent of the thirteen interviewed), petitioners argue that the survey is deficient in that the licensee failed to interview a sufficient number of community leaders. ("The gravaman of the Station's ascertainment survey is the breadth of the ascertainment survey. A survey of 13 persons out of a population of 23,309 is not sufficient.") This alleged shortcoming is claimed to be particularly critical for the Spanish-Surnamed population since it is represented by only one spokesman. Hence, it is argued that the licensee has not fully informed itself of the "breadth of tastes, viewpoints, educational levels, and socio-economic levels" within the Spanish-Surnamed population. Petitioners aver that the problem is further aggravated by the fact that the one Spanish-Surnamed interviewee, Mr. Ben Rodriguez, was formerly associated with the station. As a "friend" of the station, he could not be expected to provide objective responses. Finally, petitioners criticize the licensee's survey because, they claim, it was geared to elicit information pertaining to program preferences rather than community problems.

4. Petitioners also allege that the request of one of their representatives, Ms. Mary Martinez, to inspect certain documents which the Commission requires be maintained for public inspection (see Section 1.526 of the Commission's rules) was refused by Mr. William Stewart, the licensee's principal. By way of explanation, Mr. Stewart allegedly stated that he was under no obligation to comply with the request since he had made the documents available to another member of the Committee three days earlier. Petitioner's allegation is supported by an affidavit signed by Ms. Martinez. Petitioners urge the Commission to consider this conduct by the licensee, not as an "inadvertant failure" to make the documents available, but rather as a "deliberate, calculated attempt to harass and successfully delay" the petitioners. They claim that violation of the Commission's rule in this instance also raises questions about the licensee's character qualifications.

5. In response to these allegations, Radio Longmont, Inc. filed an opposition and amendments to the KLMO and KLMO–FM applications. A review of the amendments discloses that the licensee conducted new community leader and general public surveys. Mr. William Stewart, president and general manager of the stations, consulted 34 Longmont community leaders representing "Spanish-surnamed Americans, women's organizations, business and professional groups, agriculture, labor, civic and philanthropic organizations, the educational establishment, governmental bodies, law enforcement, religious organizations, cultural organizations and youth." The licensee's general public survey, "made at two different locations in Longmont in order to assure a cross section," elicited responses from 103 individuals. In both surveys the interviewees were asked to identify the most significant problems or needs of the community.

6. As to Ms. Martinez's allegations, Mr. Stewart attests that "at no time" did he refuse to allow her to inspect material from the public file. He explains that there apparently was a misunderstanding between them in that when she asked to inspect the "renewal file" he "specifically inquire[d] as to what she wanted to see"; that she "responded that she did not really want to see it, that she just wanted to get good cooperation from KLMO"; and that Ms. Martinez "did not again ask to see the file." Mr. Stewart states that the renewal file has been and continues to be readily available and that to avoid any further misunderstandings, no questions will be asked of those persons desiring to see the stations' public file.

7. In conclusion, the licensee observes that petitioners are primarily concerned about the stations' service to the Spanish-Surnamed community. As evidence that it has been responsive to the needs and interests of that group, the licensee points to two programs initiated by the stations: (i) "Spotlight" is described as a 30-minute, twice-weekly local public affairs program devoted to local community problems, including those of interest to the Spanish-Surnamed community; and (ii) the second program, "De Colores" is a two-hour, twice-weekly presentation hosted by a Spanish-speaking person and is specifically designed to serve the needs and interests of the Spanish-Surnamed community. In addition to presenting these programs, the licensee has established an advisory committee (whose membership includes Ms. Martinez and Mr. Stewart) to discuss the stations' programming, with particular emphasis placed on the needs and interests of the Spanish-Surnamed community.

CONCLUSIONS

8. Part I of Section IV–A of the application for renewal of license requires, *inter alia*, that the licensee describe the methods used to ascertain the needs and interests of a station's service area, state the significant needs and interests ascertained, and list the typical and illustrative programs or program series to be presented to meet those needs and interests. The guidelines to be followed in preparing this portion of the renewal application are set forth in the Primer (paragraph 4, *supra*). At the time that Radio Longmont, Inc. filed its renewal application, however, the Primer had not yet been adopted. Hence, the proposed Primer (*Primer on Ascertainment of Community Problems by Broadcast Applicants*, 20 FCC 2d 880 (1969)) governed the licensee's original survey. But, as noted above, the licensee amended Part I of its application after conducting a new survey. We have decided to accept this amendment pursuant to Section 1.522 of our rules. Accordingly, two results must follow: (i) the question raised by the petitioners as to "[w]hether the original survey was adequate is no longer determinative" [1] (*Evening Star Broadcasting Company*, 27 FCC 2d 316, 337 (1971) (footnote omitted) aff'd *sub nom. Stone* v.

[1] We note in this regard that the petitioners did not avail themselves of the opportunity to file a reply to the licensee's opposition and amendments. The Commission has reviewed the new survey to determine whether it meets our requirements. Rather than describe that review in every detail, we discuss herein only those aspects of the survey which were mentioned by petitioners in their objection.

F.C.C., 466 F. 2d 316 (1972)); and (ii) the guidelines enunciated in the Primer, as adopted, govern the new survey.

9. Briefly, the Primer requires that the licensee consult with the leaders of the significant segments of the population that comprises the service area and with a random sample of members of the general public in the community of license. The purpose of these consultations is to elicit from the interviewees what they believe to be the problems faced by the community. As stated above (paragrapph 3) petitioner's complaint is based on an alleged failure by the licensee to comply with these requirements when it conducted the original survey. While we take no position with regard to that allegation as it applies to the first survey, we find that licensee's ascertainment efforts as reflected in its amendment do comport with the guidelines set forth in the Primer. Specifically, as described above (paragraph 5), the licensee consulted with 34 community leaders representing various groups within the community. Of particular interest here, we note that the licensee consulted at least seven Spanish-Surnamed leaders. Hence, it appears that the range of group leaders consulted is representative of various community elements; that no significant group has been omitted; and that the licensee has reasonably exercised its discretion in selecting the leaders to be interviewed. As to its survey of the general listening public, the licensee apparently took reasonable steps to assure that a random sample was consulted. Finally, the licensee did not ask interviewees to name program preferences; rather it elicited information concerning community problems.

10. With regard to petitioners' allegations concerning the availability of the renewal file, we note that Section 1.526 of the Commission's rules requires that licensee's maintain certain records, including a copy of the most recent renewal application, available for public inspection.[2] On the basis of the information before us, it cannot be determined whether Mr. Stewart violated the rule. In the context of our review of these renewal applications, however, we conclude that an affirmative finding on that point would not warrant denial of license.[3] At most, we have only an isolated instance of possible violation which, in light of our decision to treat the untimely petition as an informal objection (see para. 2, *supra*), does not appear to have prejudiced the petitioners. Any question raised by petitioners' allegations is not, within the meaning of Section 309(d) of the Communications Act of 1934, as amended, so substantial or material as to require a hearing.

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[2] At the time the alleged violation took place, the Commission was considering many complaints similar to the one here that other licensees has also failed to comply with the rule. On February 23, 1971, the Commission issued a public notice reminding licensees of the requirements of Section 1.526 and clarifying any possible misunderstandings of its provisions. Despite this effort, however, the Commission found reason to issue still further public notices and orders regarding this matter on November 9 and December 17, 1971. This background does not, of course, excuse any violation of the rule, but it does place the instant facts in a clearer perspective.

[3] In support of their argument that the alleged violation reflects on the licensee's character qualifications, petitioners cite an initial decision, *Fred Kaynbier et al.*, 34 FCC 2d 801 (1970). That case is inapposite, however, in that the Hearing Examiner found that the station in question has been "frequently operated in derogation of the Commission's rules as to the presence of qualified personnel and as to log keeping." 34 FCC 2d at 820. Further, the Examiner found that the licensee displayed a lack of candor during the hearing. By way of contrast, we have before us here no evidence that Radio Longmont, Inc. has indulged in a comparable pattern of conduct or that Mr. Stewart lacks candor.

11. In view of the foregoing, and upon review of applications for renewal of licenses for Stations KLMO and KLMO-FM, we conclude that Radio Longmont, Inc. is legally, technically, financially and otherwise qualified to remain a licensee and that a grant of its renewal applications would serve the public interest, convenience and necessity.

12. Therefore, IT IS ORDERED, That the petition to deny filed by the Colorado Committee on Mass Media and the Spanish-Surnamed, Inc. IS DISMISSED; and that when considered as an informal objection filed pursuant to Rule 1.587 the aforementioned petition IS DENIED.

13. IT IS FURTHER ORDERED, That the above-captioned applications for renewal of licenses for Stations KLMO and KLMO–FM, Longmont, Colorado, ARE HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-438

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SWANCO BROADCASTING, INC. (KWEN(FM)), TULSA, OKLA. For Construction Permit	File No. BPH-7721

MEMORANDUM OPINION AND ORDER

(Adopted April 25, 1973; Released April 30, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT. COMMISSIONERS REID AND WILEY ABSENT.

1. The Commission has before it for consideration the grant on January 31, 1972, of the above-captioned application of Swanco Broadcasting, Inc. (Swanco), licensee of FM radio station KWEN, Tulsa, Oklahoma, for a construction permit to increase effective radiated power from 62 kW (horizontal) to 100 kW (horizontal and vertical), increase antenna height above average terrain from 295 feet to 300 feet, and to make equipment changes. The Commission also has before it for consideration its action of June 1, 1972, affirming grant of the above-captioned application without hearing, but subject to a condition, and denying the petition for reconsideration filed by KFMJ, Inc. (petitioner), licensee of FM radio station KRAV, Tulsa, Oklahoma. *Swanco Broadcasting, Inc. (KWEN(FM))*, 35 FCC 2d 345, 24 RR 2d 569, released June 6, 1972. In July 1972, KFMJ, Inc. (petitioner), filed an appeal in the United States Court of Appeals for the District of Columbia Circuit, *KFMJ, Inc.* v. *Federal Communications Commission*, Case No. 72-1620, contending, *inter alia*, that in its decision, the Commission had not disposed of petitioner's contention that Swanco Broadcasting, Inc., had made misrepresentations to the Commission. Upon re-examination of its opinion, the Commission determined that further consideration was warranted and moved the Court of Appeals to remand the cause to the Commission. The motion was granted by the court on December 1, 1972. Following the remand, Swanco was, by letter dated January 3, 1973, requested by the Commission to furnish a report indicating whether it had received any complaints of increased or new "blanketing" interference attributable to operation of station KWEN with the facilities authorized in BPH-7721 and, if so, to indicate the steps which were taken to investigate the complaints, the applicant's conclusions as to the causes, and the remedial steps taken, if any, to eliminate the interference. Simultaneously, the Commission asked petitioner to advise whether it had re-

ceived any complaints and, if so, what procedures it had followed in transmitting those complaints to Swanco.

2. In response to these letters, Swanco informed the Commission, by letter filed February 1, 1973, that it had begun operation with its newly authorized facilities on July 11, 1972, and that, since that time, it had received no complaints of any kind, directly or indirectly, there being none from station KRAV. Swanco further advised that all concerned personnel had been alerted to the importance of referring any such complaints to management immediately. Petitioner, by letter filed February 2, 1973, stated that a single complaint had been received and, after investigation by petitioner's personnel, the complaint had been referred to Swanco. At the same time, petitioner protested that the presence or absence of complaints was irrelevant. On March 15, 1973, Swanco filed a letter under oath by its Chief Engineer in response to petitioner's letter. It is there stated that Swanco had never received petitioner's referral of its single interference complaint until it received a copy of petitioner's letter from Swanco's counsel. Swanco's investigation of the complaint revealed that the complainant was not receiving interference, but because he had no outside receiving antenna he was receiving a very weak signal from station KRAV and a strong signal from station KWEN. The Chief Engineer installed a receiving antenna and a filter which reduced the strength of the signal from KWEN and improved reception of the signal from KRAV. The improvement was acknowledged by the complainant by letter to Swanco, a copy of which was attached to Swanco's report.

3. In addition to the single complaint discussed above, Swanco also reported that, just prior to the filing of its letter, it received a telephone call from a listener stating that he believed that he was receiving interference from KWEN. This complainant stated that he had heard an announcement broadcast on station KRAV giving KRAV's telephone number and inviting anyone who had interference to call that number. Upon calling KRAV, the listener was referred to KWEN. KWEN's Chief Engineer offered to visit the complainant and see if he could solve the problem, but the complainant declined the invitation. According to KWEN's Chief Engineer, the complainant's description of the interference would seem to indicate that it was being caused by some electrical device, such as an adding machine or other piece of office equipment and, in any event, the complainant was located about .9 miles from the KWEN transmitter, which was probably beyond the area in which "blanketing" interference could be expected. There have been no other complaints; the Commission has received none.

4. Petitioner's contention that the absence of listener complaints is irrelevant is not tenable. Listener complaints are an indication as to whether significant interference exists. It has been the Commission's experience that where interference is significant, there will be listener complaints. Interference can, of course, be determined, but it is radio reception by listeners which the interference rules are designed to

protect.[1] Obviously, if there is interference in this case, it is not of sufficient intensity to arouse listener interest. The fact that KRAV virtually advertised for complaints without results emphasizes the validity of this view. We thought that the question of interference was important enough to warrant imposition of a specific condition on Swanco's authorization and it appears that Swanco has scrupulously met that condition. Moreover, as we pointed out in our original decision, the rule contemplates a grant although blanketing may occur, provided that the conditions specified in the rule are met. Swanco is bound, by the condition to which its authorization is subject, to continue to be alert to any blanketing interference complaints, to investigate them in good faith, and to take remedial measures if it is determined that the complaints are valid and arise out of the operation of station KWEN as authorized by our grant of January 31, 1972. We think that, after operating for more than eight months with the new facilities in the face of activities by KRAV which would tend to stimulate complaints, it is clear that our original determination was correct.

5. We turn now to the question of misrepresentations allegedly made to the Commission by Swanco. Petitioner charges that, in response to that part of the application form which requires a map indicating all radio stations within two miles of the transmitter site, Swanco referred to, and incorporated by reference, an engineering exhibit from an application (BPH–5400) which it had filed in June 1966. The application form permits incorporation by reference if the application containing the incorporated material is fully identified and the applicant indicates that there had been no change since the date of filing. Swanco fully identified the source but did not state that there had been no change since the date of filing. The map in question showed stations KAKC–FM and KRAV in close proximity to the KWEN site. Stations KAKC–FM and KRAV had, however, moved in 1969 from the site shown on the 1966 map and to the extent that the map showed them at the 1966 site, it was clearly incorrect in 1972. The significance of this is, according to petitioner, that where transmitters of high-powered stations are in close proximity to one another, the high fields in the area will tend to offset each other and minimize blanketing interference, but where only one of several local stations is in a residential area and the others are outside that area, the high fields of the station in the residential area will not be offset and blanketing interference is much more likely. Thus, petitioner concludes, Swanco made material misrepresentations to the Commission.

6. Swanco has conceded that it made an error and has explained that, because it was not proposing a different site, the thought that there may have been significant changes in the area which would render the 1966 map obsolete and inaccurate never occurred to it. We think that this is a reasonable and credible explanation and although Swanco may have been careless, this does not amount to misrepresentation. The Commission demands of its licensees and applicants absolute

[1] Not all interference is prohibited. For example, where FM station transmitters are on sites which meet all spacing requirements, any interference which occurs while the stations are operating in conformity with their authorizations must be accepted. (See section 73.209 (a) and (b) of the Commission's rules.)

candor, but it cannot and does not expect infallibility.[2] This is the type of case which we had in mind when we said, in *Radio Eden*, 21 FCC 2d 464, 18 RR 2d 354:

> Certainly it cannot be said that the applicant has, at all times, proceeded with scrupulous regard for detail. Indeed, this application is an example of those instances when—all too often—applicants fail to exercise sufficient care in preparing and executing their applications with the result that they cause inconveniences and delays in the administrative process and difficulties for themselves.

There is nothing in the pleadings which convinces us that Swanco is guilty of anything other than oversight. While we cannot condone such carelessness, we find no warrant for concluding that Swanco has made a willful or intentional effort to deceive or mislead the Commission. Petitioner also claims that Swanco's engineer persists in falsely representing that the area where the KWEN transmitter is located is industrial and not residential. In our original decision, we made a specific finding, for the purposes of this case, that the area was residential and it is immaterial, therefore, whether Swanco's engineer perseveres in his opinion as to the character of the area. Finally, petitioner contends that the Commission ignored its own rules by refusing to require Swanco to make a showing as to the availability of other sites. Swanco did not propose a different site, but intended to operate at the same site which was authorized in 1966. The rule requires a showing of the availability of other sites only where blanketing problems may appear to be excessive and, as we observed in our original decision, this was precisely the question to be resolved. Swanco has operated from the site for about six years and there was no substantial evidence that excessive blanketing was being caused or would be likely to be caused. Consequently, we examined petitioner's allegations in this respect to determine whether it had alleged any facts to support its contention that there would be excessive blanketing. We found that petitioner had furnished no such support and we concluded that there would not be excessive blanketing, a conclusion subsequently proved valid by events.

7. Having reviewed this matter in the light of petitioner's contentions of error, we find that Swanco has made no misrepresentations to the Commission and that there is no excessive blanketing interference within the meaning of our rules. We find no reason, therefore, to alter our original judgment. Accordingly, IT IS ORDERED, That the grant of Swanco's application on January 31, 1972, and our action of June 1, 1972, sustaining that grant and denying KFMJ, Inc.'s, petition for reconsideration, ARE REAFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] At one time or another, nearly every applicant has made a mistake in an application filed with the Commission. For example, the petitioner, in an application (BPH–6629) filed in February 1969, referred to and incorporated by reference a map in an application (BPH–3741) which it filed in April 1962, indicating that there had been no change since the date of filing. The 1962 map did not show station KWEN, but in 1969, KWEN was at its present site. In 1969, therefore, the 1962 map was inaccurate and the application was clearly in error.

F.C.C. 73–448

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of TELEVENTS OF CALIFORNIA, INC., BRENTWOOD, CALIF. For Certificate of Compliance	CAC–1549 CA–556

MEMORANDUM OPINION AND ORDER

(Adopted April 25, 1973; Released April 30, 1973)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; AND H. REX LEE CONCURRING IN THE RESULT.

1. Televents of California, Inc., has applied for a certificate of compliance to begin cable television service at Brentwood, California, a small community located within two major television markets: San Francisco-Oakland-San Jose, California (#7), and Sacramento-Stockton-Modesto, California (#25). Televents proposes to carry the following signals:

KTVU (Ind.), Oakland, Calif.
KRON–TV (NBC), San Francisco, Calif.
KPIX (CBS), San Francisco, Calif.
KGO–TV (ABC), San Francisco, Calif.
KQED–TV (Educ.), San Francisco, Calif.
KBHK–TV (Ind.), San Francisco, Calif.
KGSC–TV (Ind.), San Jose, Calif.
KCRA–TV (NBC), Sacramento, Calif.
KXTV (CBS), Sacramento, Calif.
KVIE (Educ.), Sacramento, Calif.
KTXL (Ind.), Sacramento, Calif.
KOVR (ABC), Stockton, Calif.

2. Great Western Broadcasting Corporation, licensee of Television Broadcast Station KXTV, Sacramento, California, objects to certification of this application on the ground that "Televents' cable system at Martinez-Pleasant Hill, California, violates Section 76.55 of the Commission's Rules [1] as it carries KXTV on a part-time basis when the station is entitled to full-time carriage. The station manager and its counsel have made informal attempts to secure full-time carriage for KXTV, but without success. Consequently, Great Western argues that Paragraph 112 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 123, 186, requires resolution of this controversy before the present application can be granted. In addition, Great Western urges

[1] Section 76.55 of the Rules provides:
"Where a television broadcast signal is carried by a cable television system, pursuant to the rules of this subpart, the programs broadcast shall be carried in full, without deletion or alteration of any portion except as required by this part."

that Televents' failure to state clearly its intention to comply with the syndicated program exclusivity rules is another reason to delay or deny certification.

3. Since no one contends that this application is inconsistent with the rules, we do not believe that the public interest will be served by delaying certification for the reasons advanced by Great Western. We cannot take cognizance of a dispute in which the parties have only informally approached each other. If Great Western desires adjudication of its complaint against Televents' Martinez, California, system, the appropriate forum is a proceeding before this Commission in which all relevant facts would be presented.[2]

4. Although not raised in an objection, we believe that we should "*sua sponte*" consider the extent to which Televents' franchise departs from our requirements. The Brentwood, California, franchise was adopted November 28, 1968, after a full public hearing. Construction must commence within 90 days of the receipt of all necessary authorizations, subscriber rates are established which can only be changed with the approval of the City Council, the City Administrator is empowered to intervene in and dispose of controversies arising from the operation of the system, and the initial franchise term is twenty years. The cable system is obliged to pay an annual fee of 5% of its gross receipts to the City. Judged against the criteria established in *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10, *reconsideration denied*, FCC 73–293, —— FCC 2d ——, we find the franchise substantially complies with Section 76.31 of the Rules.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for certificate of compliance (CAC–1549) for Brentwood, California, filed by Televents of California, Inc., IS GRANTED and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the "Objection of Great Western Broadcasting Corporation Pursuant to Section 76.27" filed February 1, 1973, by Great Western Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[2] We note that the Martinez-Pleasant Hill system is "grandfathered". As a result, it may be entitled to vary from our rules until March 31, 1977. While it is not clear that this is the case, it is just this type of possibility which dissuades us from the type of collateral adjudication sought by Great Western.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of THOMS BROADCASTING CO., INC., ASHEVILLE, N.C. For Certificate of Compliance	CAC–139 NCO32

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1973; Released April 26, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT; COMMISSIONER JOHNSON DISSENTING.

1. Thoms Broadcasting Company, Inc. operates a 20-channel cable television system at Asheville, North Carolina, one of the designated communities of the Greenville-Spartanburg-Anderson, South Carolina-Asheville, North Carolina major television market (#46). The system currently provides its 3300 subscribers with the following television signals:

WANC–TV (Ind., Channel 21), Asheville, N.C.
WLOS–TV (ABC, Channel 13), Asheville, N.C.
WUNF–TV (Educ., Channel 33), Asheville, N.C.
WKPT–TV (ABC, Channel 19), Kingsport, Tenn.
WBIR–TV (CBS, Channel 10), Knoxville, Tenn.
WFBC–TV (NBC, Channel 4), Greenville, S.C.
WSPA–TV (CBS, Channel 7), Spartanburg, S.C.
WCYB–TV (NBC, Channel 5), Bristol, Va.
WJHL–TV (CBS, Channel 11), Johnson City, Tenn.
WSJK–TV (Educ., Channel 2), Sneedville, Tenn.

Thoms has filed, and subsequently amended, an application for certificate of compliance to add the following television signal:

WRET–TV (Ind., Channel 36), Charlotte, N.C.

2. The proposed carriage of WRET–TV is fully consistent with the Commission's Rules. Pursuant to Section 76.251(c) of the Rules, Thoms must correspondingly provide one specially designated public access channel. In its original application, Thoms indicated that although it had the requisite channel capacity for such access purposes, it lacked the required minimal equipment necessary for program production. This admission drew objections from Wometco Skyway Broadcasting Company, Inc., licensee of Station WLOS–TV, Spartan Radiocasting Company, licensee of Station WSPA–TV, and Multimedia, Inc., licensee of Station WFBC–TV. These objections have been mooted by Thoms' subsequent assurance that it now has equipment sufficient to meet the standards of Section 76.251(a)(4) of the Rules.

3. Multimedia, Inc. and Spartan Radiocasting Company also seek an unequivocal written commitment by Thoms that it will provide the required network program exclusivity to their stations. Thoms asserts that the Commission's Rules do not require a system to make such a commitment or any showing that it has and will use certain switching equipment. Thoms states that all responsible systems, including itself, will operate by "striving" to meet their regulatory responsibilities. Evidence submitted by WSPA–TV, and not denied by Thoms, recounts several lengthy periods during which Thoms failed to provide requested exclusivity due to alleged malfunctions of switching equipment and made no effort to provide interim compliance via manual switching.

4. For a cable system to be granted authority to commence operations or add television signals, we have required that it conform to certain standards and regulations; that is the essence of a "certificate of compliance." One of the prime obligations of a cable system is to provide network program exclusivity, when it is properly requested, absent waiver of the rules. In this case, the Asheville system has been in operation for more than four years and, by its previous conduct, has indicated its good faith intention to comply with the exclusivity rules. It is not presently seeking a waiver, and has waived its right to a stay of the exclusivity requirement, even if it were presently seeking a waiver. (See Section 76.97 of the Rules.) Although occasional equipment malfunctions may be expected, they should not be regarded as relieving a system from fulfilling its exclusivity obligations via manual switching. We expect the Asheville system to resolve its equipment difficulties promptly, and will require it to notify the Commission of the date on which full compliance with the exclusivity rules begins, in any event no later than the date on which Station WRET–TV is added. And we are instructing the staff to bring any future allegations of noncompliance promptly to our attention.

In view of the foregoing, the Commission finds that a grant of the subject application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for certificate of compliance (CAC–139) filed by Thoms Broadcasting Company, Inc., IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–411

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re TRI-COUNTY RADIO CORP., CONRAD, MONT. For Certificate of Compliance	CAC–451 MT–039

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1973; Released April 26, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT; COMMISSIONER JOHNSON DISSENTING.

1. On May 12, 1972, Tri-County Radio Corp. filed an "Application For Certification" (CAC–451) in which it proposed to operate a new cable television system at Conrad, Montana, which is located outside all television markets. Tri-County proposes to carry the following television broadcast signals: KRTV (NBC/CBS), KFBB–TV (ABC/CBS), both Great Falls, Montana; KXLY–TV (CBS), KREM–TV (ABC), KHQ–TV (NBC), all Spokane, Washington; and CJOC–TV (CBC), CFCN–TV (CTV), both Lethbridge, Alberta, Canada. On December 5, 1972, Tri-County filed a "Request for Acceptance of Alternative Proposal in Lieu of Franchise."

2. Tri-County contends that there are no applicable local franchising authorities in the State of Montana since the Legislature has not granted specific powers to cities and towns to regulate cable television systems constructed on pole space leased from telephone or electric companies. This contention is supported by an opinion of local counsel. Accordingly, Tri-County requests special relief pursuant to Section 76.7 of the Commission's Rules to qualify under Par. 116, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 366, which provides for case by case consideration where it is claimed that there is no franchise or other appropriate authorization available for the cable operator to submit in an application for certificate of compliance. In such cases, the applicant is expected to make an acceptable alternative proposal for assuring that the substance of our rules, and specifically Section 76.31, is complied with.

3. In support of its request for special relief, Tri-County supplies a copy of a letter written by the City Council of Conrad approving the installation of a cable television system, and a proposal which pledges compliance with the requirements of Section 76.31 of the Commission's Rules. Specifically, Tri-County agrees to operate as follows: 50% of construction will be completed within one year and total construction completed within two years of receiving Commission certification;

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initial rates of $6.50 per month for residential subscribers and installation rates no greater than $19.50 for the first connection; no increases will be made in these rates without full notice to the system's subscribers and the Commission will receive notice at such time as Tri-County must have its certificate renewed or modified; and a local business office will be maintained to resolve all subscriber complaints. There is no franchise fee paid to Conrad.

4. We believe that a grant of Tri-County's request for special relief would be appropriate. This grant is made subject to compliance with any further conditions imposed by the Commission during the period until March 31, 1977, which may result (i) from our overall proceedings to deal with this possible regulatory lacuna, or (ii) from further orders specifically directed to this case in event of facts being brought to our attention warranting action to protect the public interest. In any event, in 1977 we shall have the opportunity to review the matter, and may require special showings in these situations if there has been no local regulatory change. Compare *Sun Valley Cable Communications*, FCC 73–27, 39 FCC 2d 105.

In view of the foregoing, the Commission finds that a partial waiver of Section 76.31 of the Rules and grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application For Certification" (CAC–451) filed by Tri-County Radio Corp. IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 73–428

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 83 TO REMOVE WATCH ON 156.8 MHz WHILE MAINTAINING A WATCH ON 156.65 MHz	RM 2120

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1973; Released April 24, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The American Institute of Merchant Shipping (AIMS) on January 5, 1973, filed a petition requesting amendment of Section 83.224 of the Commission's rules regarding the watch requirements on Ch. 16, 156.8 MHz. The petition was amended by AIMS by filing dated January 11, 1973. In essence, AIMS wants the requirement for a watch on Ch. 16 changed so that no watch is required on that channel when a ship is standing a watch on Ch. 13, 156.65 MHz pursuant to the rules implementing the vessel Bridge-to-Bridge Radiotelephone Act (Public Law 92–63). In addition, AIMS has requested a waiver of the Ch. 16 watch when Ch. 13 is being guarded pending the outcome of its rule-making petition. AIMS request has been supported by a joint filing of the Radio Officers Union, AFL–CIO and American Radio Association, AFL–CIO (hereinafter referred to as the Union), Lykes Brothers Steamship Co., Central Committee on Communications Facilities of American Petroleum Institute, Gulf Oil Trading Company and the Maritime Administration.

2. The thrust of the AIMS petition is that "there is no requirement to monitor 156.8 MHz for foreign vessels subject to the Bridge-to-Bridge Radiotelephone Act, thus the large majority of oceangoing vessels within the navigable waters are not subject to this U.S. requirement." Further, ships "with single channel VHF equipment are likewise not required to monitor 156.8 MHz while complying with the Act." AIMS concludes that "the burden of maintaining a continuous listening watch falls on U.S. oceangoing vessels and may therefore discourage the fitting of VHF equipment."

3. The reasons given by AIMS in support of their request appear to be based on a misunderstanding or non-recognition of the goals of our VHF maritime mobile communications system. In order that our present VHF watch requirements may be viewed in their proper context,

it is necessary that the reasons and history leading to these requirements be set forth.

4. The Commission, on March 20, 1967, released a Notice of Proposed Rule Making in Docket No. 17295. This was the first step in our program to reduce the long-standing congestion on frequencies at 2 MHz and establish VHF as the short-range maritime mobile communications system. In that Notice we proposed that 156.8 MHz be designated for "Distress, Safety and Calling" and devoted five paragraphs to discussing the need for a continuous watch of 156.8 MHz by all ships equipped with VHF. We stated in paragraph 25 as follows:

> 25. With regard to ship stations, it is clear that the development and successful functioning of the VHF maritime radio distress system on 156.80 Mc/s is dependent upon a capability to establish communication and, once established, to intercommunicate between ship stations and between ship and coast stations. Ship stations which do not guard a distress frequency will not hear distress calls on that frequency. These ships, moving in an environment common to other ships, will be unaware of distress, urgency and safety messages of those ships and, thus, will be unable to communicate with, to receive, or to render assistance.

Even at this early date in the embryonic stages of VHF as the primary short-range maritime communications system, which predates Bridge-to-Bridge by several years,[1] we felt that the optimum arrangement "would require simultaneous watch on two or more frequencies"; however, we did not propose this system because it was felt that a multi-receiver requirement at this point in time would place too great a burden on licensees—especially the small pleasure boat owners who constitute a large majority of the group affected.

5. The Report and Order in Docket No. 17295 was released July 25, 1968. With respect to the guard on 156.8 MHz, the principles enumerated in the Notice were continued and no comments adverse to guard requirements were received. In fact, as a result of comments by North Pacific Marine Radio Council, Inc. the guard on 156.8 MHz was extended to all VHF limited coast stations.

6. To further establish VHF as the short-range maritime communications system, the Commission issued a Notice of Proposed Rule Making in Docket No. 18307.[2] In this proceeding we proposed to limit the availability of 2 MHz to ship stations which are also equipped with VHF. The practical effect of this was to make VHF mandatory for vessels which operate beyond VHF range of coast stations which can be considered to be 20–30 miles.

7. The First Report and Order in Docket No. 18307 released June 16, 1970 adopted the proposal discussed in the preceding paragraph. In adopting the proposals contained in the Notice, we made particular mention of the importance of 156.8 MHz in paragraph 27 of the Report and Order where we quoted the U.S. Coast Guard as follows:

> The Coast Guard supports the FCC goal of requiring use of VHF–FM when within range. We have embarked on a multi-million dollar program of equipment

[1] Vessel Bridge-to-Bridge Radiotelephone Act approved August 4, 1971.

[2] Docket No. 18307 did not include Alaska or the Great Lakes. These areas were treated in separate but companion proceedings in Docket Nos. 18632 and 18633. The rules as adopted in 18307 were in effect extended to Alaska and the Great Lakes and the rules are now uniform throughout the 50 states and the Great Lakes except for minor differences in Alaska.

procurement which eventually will provide continuous guard of 156.8 MHz in all areas of heavy boating traffic and to at least 20 miles offshore along our coast line. Large bodies of water such as the Great Lakes, Chesapeake Bay and Long Island Sound will be covered completely. We have already made high altitude installations in the Los Angeles and San Francisco Bay areas to improve coverage . . . Further expansion of this program depends only on the availability of funds for which we depend on Congress. Equipment to give Coast Guard helicopters "homing" capability on 156.8 MHz is being procured at the present time. In most areas of heavy boating these helicopters make regular safety patrols and will guard 156.8 MHz during these patrols. The altitude of these aircraft will further extend VHF–FM coverage. All Coast Guard search aircraft will have direction finding equipment covering 156.8 MHz in the very near future under a contract let several years ago.

8. The "Vessel Bridge-to-Bridge Radiotelephone Act" (Public Law 92–63) was approved August 4, 1971. The Commission, on November 8, 1971, released a Notice of Proposed Rule Making (Docket No. 19343) implementing the provisions of this Act. In this Notice we made specific and detailed proposals for the watch required for compliance with the Act. The separate and distinct nature of the requirement for this watch apart from any other requirements such as the watch on 156.8 MHz should have been readily apparent to even the cursory reader. In the Report and Order in Docket No. 19343 released May 31, 1972 in paragraph 36, it was made abundantly clear that a vessel subject to bridge-to-bridge with multi-channel VHF would have to maintain a continuous watch on both 156.8 and 156.65 MHz when operating pursuant to the bridge-to-bridge requirements. Pertinent portions of Paragraph 36 follow:

(c) A subject vessel with a single-channel set for bridge-to-bridge and a multi-channel set on board will have to maintain a continuous listening watch on both 156.8 and 156.65 MHz when operating pursuant to the bridge-to-bridge requirements.

(d) A subject vessel with multi-channel equipment will be required to maintain a continuous listening watch on both 156.8 and 156.65 MHz when operating pursuant to the bridge-to-bridge requirements.

(f) In order to provide the required bridge-to-bridge continuous listening watch where a multi-channel installation is utilized, a minimum of at least two VHF receivers is required. In those cases where the vessel has on board a single channel VHF set and no other VHF capability only one VHF receiver is required.

(h) The installation of multi-channel equipment with the capability of simultaneously monitoring both 156.8 and 156.65 MHz on the bridge of a vessel is the installation considered by the Commission to be the most desirable from an operational and safety point of view. It has the advantage of maintaining the commonality of a guard on the distress, safety and calling channel (156.8 MHz) on all vessels.

9. It should be noted that in each of the three major proceedings discussed above, comments were filed by AIMS or its predecessor organization American Merchant Marine Institute (AMMI). Issue was not taken with the watch requirement now complained of. There is no question that AIMS was well aware of our VHF program and the requirements of the program.

10. The boating universe runs the gamut from small pleasure craft to our largest supertankers and passenger vessels. The only common link between them is on VHF Ch. 16, 156.8 MHz. Bridge-to-Bridge will not apply for the most part to a large number of pleasure vessels. The importance of the watch on 156.8 MHz is well documented and established as is the statutory requirement for a watch on the desig-

nated bridge-to-bridge frequency 156.65 MHz. It is clear that any lifting of the watch requirement on 156.8 MHz will seriously impair if not emasculate the VHF maritime mobile communications service. Therefore, it is essential that the need for any relaxation be amply documented.

11. We have no documentation of need in the AIMS request. It is at best a bare request without any persuasive reason. AIMS claims a "burden of maintaining a continuous watch" but it doesn't define the burden and we do not see any burden, let alone one that would justify such a drastic action as dropping the Ch. 16 watch. The requirement to have a dual monitoring capability means one additional receiver and if located on the bridge as we recommend (see paragraph 8 above, quote of paragraph 36(h)), it obviously doesn't create any additional manpower requirements. The reason advanced that the requirement "may therefore discourage the fitting of VHF equipment" is likewise without merit. Ships need or are required to have radio and as explained above VHF is a prerequisite to other radio. Further, the Coast Guard is establishing a vessel Traffic System (VTS) in major U.S. ports and waterways on VHF. VHF is here and its growth will not be hampered by requiring a Ch. 16 watch—a relaxation of the watch, however, would destroy the effectiveness of the system.

12. AIMS position that "there is no requirement to monitor 156.8 MHz for foreign vessels subject to the Bridge-to-Bridge Radiotelephone Act, thus, the large majority of oceangoing vessels within the navigable waters are not subject to this requirement" begs the question. While foreign vessels may constitute the large majority of oceangoing vessels in U.S. navigable waters they constitute a very small percentage of marine radio equipped vessels in U.S. navigable waters—pleasure boats are by far and away the dominant category. Almost all of these pleasure vessels are equipped for multi-channel operation and a watch on 156.8 MHz is required during the radio stations' hours of operation. In addition, both foreign and U.S. vessels are subject to the ITU Radio Regulations which provide, in pertinent part, as follows:

> **1367 (4) Ship stations should, where practicable, maintain watch on 156.80 Mc/s when within the service area of a coast station providing international maritime mobile radiotelephone service in the band 156–174 Mc/s.**

A large number of foreign vessels coming into the United States will be equipped with multi-channel VHF. They will, in most cases, pick up a pilot who will have a portable radio which will be used to fulfill the Bridge-to-Bridge requirement (See Section 83.703) and this will free the multi-channel set and make "practicable" the maintenance of a watch on 156.8 MHz. It seems unlikely that a foreign vessel under these circumstances would shut down its 156.8 MHz watch in disregard of ITU 1367 and the established U.S. safety system.

13. The comment of the Gulf Oil Trading Co. indicates that a reason for the AIMS request may be Union contracts between ship owners and radio operators which place responsibility for the Ch. 16 watch on the radio officer. In some circumstances, this apparently may result in some additional expense to the ship owner. However, the remedy

would seem to lie in the mutual private efforts of the parties involved rather than in the alteration of the VHF safety system.

14. As an additional matter, AIMS has requested the Commission to take into consideration the difficulty U.S. steamship companies are encountering, despite good faith efforts to obtain additional equipment to comply with bridge-to-bridge requirements. The Commission is not unmindful of the difficulties encountered by various segments of the maritime industry in obtaining suitable equipment for bridge-to-bridge communications. Licensees making timely good faith efforts to obtain proper equipment will not be subject to Commission sanctions, during the 90 day period suggested by AIMS (January 11–April 11, 1973), if their radio equipment doesn't meet all of the technical characteristics required for compliance with bridge-to-bridge regulations. However, the basic requirements of the Act, i.e., operation on the designated frequency (Ch. 13) is statutorily in effect and not subject to our alteration.

15. In view of the foregoing, the petition for rule amendment and request for waiver of the watch requirements contained in Section 83.224 filed by AIMS, ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R–170

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WESTERN COMMUNICATIONS, INC. (KORK–TV), LAS VEGAS, NEV. For Renewal of License	Docket No. 19519 File No. BRCT–327
LAS VEGAS VALLEY BROADCASTING CO., LAS VEGAS, NEV. For Construction Permit for New Television Broadcast Station	Docket No. 19581 File No. BPCT–4465

MEMORANDUM OPINION AND ORDER

(Adopted April 25, 1973; Released April 30, 1973)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER ABSENT.

1. The Review Board has before it a contingent motion to add an *ex parte* issue against Las Vegas Valley Broadcasting Co. (Valley), filed March 6, 1973, by Western Communications, Inc. (Western); a request for proceeding pursuant to Section 1.1251(a) to determine whether sanctions should be imposed on Valley for making, encouraging, or soliciting unauthorized *ex parte* presentations or failing to report such presentations, filed March 6, 1973, by Western; and a request to withdraw pleadings, filed April 2, 1973 by Western.[1]

2. These pleadings are all related in that they arise from the conduct of Donald W. Hendon, a witness in the above-captioned proceeding. Western alleges that Hendon is an interested party within the meaning of the Commission's Rules, that he communicated directly by letter with Commissioner Johnson and attempted to speak personally with the Commissioner and other Commission decision-making personnel without proper service or notice upon Western or other parties to the proceeding as required by the Rules. Western contends that since Hendon has been in close communication with Valley and was called by Valley as its witness in this proceeding, should the Commission not grant its motion for a separate proceeding under Section 1.1251(a), an issue to determine whether Valley improperly solicited Hendon's *ex parte* participation in this proceeding and the effect of this solicitation on Valley's qualifications to be a Commission licensee should be added to the proceeding.

[1] The Board also has before it a letter, dated March 29, 1973, from counsel for Valley concerning Western's contingent motion to add *ex parte* issues; a motion for leave to file comments, and comments supporting Western's request to withdraw pleadings, filed April 17, 1973, by Valley; and a reply to comments, filed April 18, 1973, by Western

3. At a hearing session in this proceeding held in Las Vegas on March 15, 1973, Hendon appeared as a witness. After Hendon's direct testimony and cross-examination, it was agreed by all parties to this proceeding, including the witness, that his testimony would be sealed, and not relied upon by any of the parties or the Presiding Judge for proposed findings and conclusions or the Initial Decision.[2] Western thereupon filed its request to withdraw its contingent motion to add an *ex parte* issue.[3] Since neither the proponent nor the other parties to this proceeding wish to pursue the contingent motion to add an *ex parte* issue, and since it does not appear that any useful purpose would be served by adding the issue, Western's request to withdraw pleadings will be granted and the motion will be dismissed.

4. Western's request to institute a proceeding pursuant to Section 1.1251(a), which was informally referred to the Review Board, is based entirely upon the conduct of Hendon. It is conceded by all concerned that Hendon wrote the letters complained of. However, the matters alleged by Western do not raise questions concerning Valley's involvement in Hendon's conduct. The facts that Hendon, an interested citizen who had become concerned with operating practices of the Las Vegas television stations, including KORK–TV, would be called as a witness by Valley, that he may have discussed KORK–TV's operation with counsel for Valley, or that he had a greater knowledge of the status of this proceeding than might normally be expected, do not justify the inference which Western would have us draw from those circumstances. Nor has Western submitted affidavits of persons with knowledge of the facts, or other evidence, which warrant addition of the requested issue. In the absence of such evidence, we must conclude that Western's request for a Section 1.1251(a) proceeding is based wholly upon conjecture and surmise, and must therefore be denied.

5. Accordingly, IT IS ORDERED, That Valley's motion for leave to file comments, filed April 17, 1973, IS GRANTED; that Western's motion to withdraw pleadings, filed April 2, 1973, IS GRANTED, its contingent motion to add an *ex parte* issue, filed March 6, 1973, IS DISMISSED; and its request for proceeding pursuant to Section 1.1251(a), filed March 6, 1973, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] Memorandum, FCC 73M–453, released April 13, 1973.
[3] The request to withdraw pleading was filed pursuant to oral agreement of the parties at the time the Judge sealed Hendon's testimony.

F.C.C. 73R–169

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WOIC, INC. For Renewal of License of Station WOIC, Columbia, S.C.	Docket No. 19674 File No. BR–1220

MEMORANDUM OPINION AND ORDER

(Adopted April 24, 1973; Released April 30, 1973)

BY THE REVIEW BOARD:

1. Before the Review Board is a motion, filed February 23, 1973, by WOIC, Inc. (WOIC), seeking deletion of the issues designated for hearing against the applicant [1] or, in the alternative, requesting that the Board certify the motion to the Commission pursuant to Section 0.361(b) of the Commission's Rules.[2] The Commission designated WOIC's renewal application for its standard broadcast station in Columbia, South Carolina, for hearing by Memorandum Opinion and Order, FCC 73–106, 39 FCC 2d 355, released February 1, 1973, on issues concerning WOIC's ascertainment of community needs (*Suburban* issue) and misconduct allegedly arising from the operation of WTMP, a broadcast station whose corporate license was controlled by WOIC's principal stockholder.[3]

2. WOIC maintains that there are three bases for deleting the issues concerning the misconduct which allegedly arose from the operation of Station WTMP. First, petitioner contends it has never been given an opportunity to respond to the allegations of misconduct which were contained in Columbia Citizens' untimely supplemental petition to deny petitioner's renewal application.[4] WOIC avers that it had never been advised, until the Order designating the WOIC application for hearing was issued, that this supplemental petition had been accepted by the Commission and should, therefore, be afforded an opportunity to answer it on its merits. Second, WOIC maintains that the Commission is estopped from designating the WOIC renewal

[1] Also before the Board are oppositions by the Broadcast Bureau and Columbia Citizens Concerned With Improved Broadcasting (Columbia Citizens), filed March 8 and 9, 1973, respectively.

[2] In the Board's judgment, the matters at issue do not warrant certification to the Commission because they are not novel and the precedent governing them is clear.

[3] During the time of the alleged misconduct in 1968–69, Joe Speidel, III, owned more than 99% of the stock in Speidel Broadcasters, Inc., a company which owned WOIC, Inc., and WTMP, Inc.

[4] In spite of the untimeliness, the Commission elected to consider Columbia Citizens' petition to deny as an informal objection filed pursuant to Rule 1.587. The Commission also granted the late filed supplemental petition, filed February 12, 1971, since it pertained to serious matters concerning the character qualifications of WOIC's majority stockholder. See notes 1 and 3 of the designation Order, *supra*.

application for hearing on the issues of misconduct arising from WTMP's operations because, on August 18, 1972, the Commission granted the assignment by WTMP, Inc. of Station WTMP to Gulf South Communications Lts., in spite of being on notice of the allegations of misconduct contained in Columbia Citizens' previously filed supplemental petition to deny. Petitioner notes that the Commission will not permit a license assignment in instances where the licensee has been guilty of serious misconduct in the operation of its station, and contends that the grant of the assignment application of Station WTMP was tantamount to an affirmative ruling that the applicant was qualified to be a Commission licensee and that allegations of misconduct lacked substance. While the doctrines of *res judicata* and equitable estoppel do not ordinarily apply to decisions of administrative tribunals, petitioner notes, grant by the Commission of the WTMP assignment application has "severely prejudiced" WOIC in its ability to prepare its defense. And third, petitioner contends that WOIC has been denied the due process to which it is entitled because it has not been afforded the opportunity for a timely hearing on issues, the bases of which arose nearly two years before issuance of the designation Order and concern events occurring nearly five years before issuance of that Order. WOIC states that the Commission's failure to act on the WOIC renewal application has "irreparably damaged" petitioner's ability to prepare its defense because records have been lost, destroyed, or are otherwise unavailable to it; and persons having knowledge of the alleged misconduct are either unavailable, incapable of accurately remembering events, or, in any case, no longer in applicant's employment.

3. In support of its request seeking deletion of the *Suburban* issue, WOIC reiterates its "due process" argument and also argues that its ascertainment of community needs was adequate and compares favorably with the showings deemed acceptable in reported decisions issuing from the Commission at the time the renewal application was submitted.[5] It also compares favorably, WOIC maintains, with the showings at that time made by other radio stations licensed in Columbia and other Black-oriented stations in similar metropolitan areas. Finally, WOIC compares the results of its 1969 and its more thorough 1972 ascertainment survey, noting the similarity between the needs elicited in both, and arguing that this constitutes further evidence of WOIC's familiarity with the community needs in 1969.

4. The Review Board will deny petitioner's motion to delete the issues. It is well established that the Board will not delete issues absent unusual circumstances, such as where the Commission overlooked, misconstrued, or failed to consider pertinent information relative to its determination to specify the issues for hearing. *Edward G. Atsinger, III*, 30 FCC 2d 493, 22 RR 2d 236 (1971); *Cowles Florida Broadcasting Inc.*, 29 FCC 2d 799, 21 RR 2d 1229 (1971); *Sundial Broadcasting Co., Inc.*, 15 FCC 2d 1002, 15 RR 2d 353 (1969). Peti-

[5] Although petitioner argues otherwise, the Board notes that the Commission did cite extensive authority to support its justification for designating this issue. See paragraphs 11 and 12, designation Order, *supra*.

tioner's arguments appear to be based on no more than its own evaluation of the renewal application and the relevancy of matters raised in Columbia Citizens' petition and supplemental petition to deny that application, all of which were considered by the Commission before it designated the issues for hearing. In accordance with *Atlantic Broadcasting Company* (*WUST*), 5 FCC 2d 717, 8 RR 2d 991 (1966) and *Fidelity Radio, Inc.*, 1 FCC 2d 661, 6 RR 2d 140 (1965), the Board is foreclosed from substituting its judgment for the Commission's reasoned analysis.

5. The specific arguments petitioner raises in its motion fail on their merits. First, as noted in both oppositions, WOIC did have an opportunity to reply to Columbia Citizen's supplemental petition to deny and, in fact, did.[6] Second, WOIC has not shown that there are any facts in this proceeding which would warrant the application of the doctrine of equitable estoppel. The Board does not consider, as petitioner argues, that grant of the WTMP assignment application constituted an affirmative indication by the Commission that the allegations made in this proceeding of misconduct in the operation of Station WTMP lacked merit. These allegations had not been raised in connection with the transfer application, and we have no indication that they were considered by the Commission in acting on the transfer. Finally, petitioner's argument that the Commission's delay in ordering a timely hearing on its renewal application has, in effect, denied WOIC due process to the prejudice of the applicant, is premature. Although petitioner contends that the delay "irreparably damaged" its ability to prepare an adequate defense, it has known since December, 1969, that its renewal application was being protested and, since February, 1971, that the question concerning alleged misconduct in the operation of WTMP had been raised. The extent WOIC has been prejudiced by the delay and the remedial action, if any, which is warranted, can best be determined in light of the hearing record on the designated issues. See *Western North Carolina Broadcasters, Inc.*, 8 FCC 2d 126, 10 RR 2d 78 (1967).

6. Accordingly, IT IS ORDERED, That the motion for deletion of issues, filed February 23, 1973, by WOIC, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[6] In its opposition to the motion for leave to submit supplemental petition, filed February 19, 1971, petitioner responded to the substance of the tendered supplement and that response was considered by the Commission at the time that it specified the issues for hearing in the instant proceeding. See note 3 and paragraphs 21 and 22, designation Order, *supra.*

F.C.C. 73–403

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WSTE–TV, INC. (WSTE), FAJARDO, P.R. For Extension of Time Within Which To Construct	Docket No. 18048 File No. BMPCT–5777
WSTE–TV, INC. (WSTE), FAJARDO, P.R. For Modification of Construction Permit	Docket No. 18049 File No. BMPCT–6029

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1973; Released April 20, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT.

1. The Commission has before it for consideration (a) a decision of the Review Board in this proceeding, FCC 72R–18, 33 FCC 2d 438, released January 25, 1972; (b) an application for review thereof, filed February 24, 1972, by WSTE–TV, Inc.; (c) a conditional application for review of the decision of the Review Board, filed February 24, 1972, by WAPA–TV Broadcasting Corporation (WAPA–TV) and Telesanjuan, Inc. (WTSJ); (d) opposition to application for review, filed March 10, 1972, by WAPA–TV and WTSJ; (e) comments to applications for review, filed March 10, 1972, by the Chief, Broadcast Bureau; and (f) reply to opposition to application for review and comments on applications for review, filed March 23, 1972, by WSTE–TV.

2. Also tendered for Commission consideration by WSTE–TV, together with requests for authority to file the pleadings are: (a) supplement to the application for review tendered on October 10, 1972; [1] and (b) a further supplement tendered on February 8, 1973.[2] WSTE–TV also filed a request for official notice on December 6, 1972.

3. The supplements to the application for review tendered for filing by WSTE–TV on October 10, 1972, and February 8, 1973, are untimely (See Section 1.115(d) of the Commission's Rules) and improperly present matters which were not submitted to, or considered by, the Review Board (Section 1.115(c) of the Rules). Furthermore, the events upon which WSTE–TV relies occurred many months before its pleadings were submitted and no satisfactory explanation is advanced for its

[1] Oppositions to the supplement were submitted on November 6, 1972, by WAPA–TV and the Chief, Broadcast Bureau; and a reply to the oppositions was submitted on November 16, 1972, by WSTE–TV.

[2] Oppositions to this pleading were submitted by WAPA–TV on February 20, 1973, and by the Chief, Broadcast Bureau on February 23, 1973. A reply to the opposition was submitted by WSTE–TV on March 7, 1973.

delay in presenting these matters to the Commission.[3] We conclude that good cause has not been shown for accepting WSTE–TV's belated pleadings and that no public interest factors have been alleged which require our consideration of the matters set forth therein on the merits at this late stage of the proceeding.

4. Accordingly, IT IS ORDERED, That the requests for permission to file the above described supplement to application for review tendered by WSTE–TV, Inc. (WSTE–TV), on October 10, 1972, and the further supplement thereto tendered on February 8, 1973, ARE DENIED; and the aforesaid pleadings ARE REJECTED;

5. IT IS FURTHER ORDERED, That the application for review, filed February 24, 1972, by WSTE–TV, Inc., IS DENIED; and

6. IT IS FURTHER ORDERED, That the conditional application for review, filed February 24, 1972, by WAPA–TV and WTSJ, IS DISMISSED as moot; and

7. IT IS FURTHER ORDERED, That the request for official notice, filed on December 6, 1972, by WSTE–TV, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] In the first supplement WSTE–TV relies primarily on the Commission's Report and Order in *TV Translators on Channels 14–69 (Docket 18861)*, FCC 71–1015 (36 FR 19588), 23 RR 2d 1504, released October 5, 1971. However, as pointed out by the Bureau, a public notice was released on July 9, 1970, which invited interested persons to apply for UHF translators on Channels below 70 pending a final decision in Docket 18861. The further supplement relies on the Commission's Report and Order in *Standards for Computing VHF Coverage*, 35 FCC 2d 114, released May 31, 1972. This proceeding involved amendments to Part 81 of the Rules with respect to the method for determining the coverage of Public Coast Class III–B stations operating in the VHF band.